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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

Volume 3
Issue 9

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities.....viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions.....xiii

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....2424

Federal Communications Commission Record

Table of Cases
Volume 3
Issue 9

Case Name	Page
AGH Communications, Inc.	2548
Aetna Life Insurance Co. and Aetna Casualty and Surety Co.	2576
Allocation of 849-851/894-896 MHz Bands	2436
Amateur Operator Examination Requirements	2468
Amateur Operator Licenses	2469
Amateur Service Auxiliary Operation	2466
Amateur Temporary Operating Authority	2465
Ameritech Operating Companies	2561
Balcones Broadcasting Limited	2528
Bell Atlantic - CEI Requirements	2587
Bell Atlantic-CEI Plan for Gateway Service	2564
COMSAT Open Meeting - Inmarsat	2565
Cable & Wireless Communications, Inc.	2487
Cable Rate Regulation Rules	2617
Carlisle & Patel	2530
Communications Satellite Corp.	2545
Computer Expenses	2489
Consortium Communications International, Inc.	2464
Daugherty, Jay	2492
Designation of a Standard Computer Algorithm	2448
Dickson, Herbert E.	2595
Eastern Transcommunications Corporation	2457
Emergency Broadcast System	2491
Enhanced Service Providers	2631
Examination Credit - Amateur Extra Class Operator License	2516
GTE Hawaiian Telephone Co., Inc.	2462
Garza, Margaret	2525
Houston Network, Inc.	2461
Interexchange Common Carriers	2474
Interference Between UHF Channels and Land Mobile Channel	2566
International 800 Telecom Corporation	2574
Investigation Special Access Tariffs of Local Exchange Carriers	2511
Issues-Programs List for Public Broadcasting Licensees	2490
Jones, Jr., John	2446
KQED, Inc.	2601
LECs Individual Case Basis DS3 Service Offerings	2582
Lamprecht, Jerome T.	2527
LeHigh Valley Telcom, Inc.	2573
MCI Telecommunications Corporation	2488
MCI Telecommunications Corporation	2575
Marlin Broadcasting of Central Florida, Inc.	2533
Maryland Port Administration	2578

Case Name	Page
Multiple Address Systems	2467
Najjar, Hann F.	2463
New Jersey Bell Telephone Company	2581
Noncommercial Educational Reservations	2517
Overseas Telecommunications, Inc.	2513
Phillips, Charles E.	2549
Polyethylene Shielded Video Cable Refunds	2638
Radio Frequency Devices	2546
Radiotelephone Communicators of Puerto Rico, Inc.	2458
Rate Base/Net Income of Dominant Carriers	2473
Regulatory Policies and International Telecommunications	2515
Responsible Accounting Officers	2454
Revision of Section 1.743 - Signature Rule	2443
Rochester Telephone Corporation	2588
Rondini, William	2590
Rules for Rural Cellular Service	2591
Ship Radio Officer Qualifying Service Endorsements	2449
Short-spaced FM Station Assignments	2444
Silver Star Communications - Albany, Inc.	2512
South American Express	2470
Swink, Jerry	2585
TRT International, Inc.	2456
Table of Allotments, FM, Albin, WY	2508
Table of Allotments, FM, Atlantic, IA	2569
Table of Allotments, FM, Augusta, GA	2524
Table of Allotments, FM, Boulder City, NV	2570
Table of Allotments, FM, Brandon, VT	2502
Table of Allotments, FM, Brenham, Round Rock, Austin, TX	2495
Table of Allotments, FM, Buffalo, WY	2424
Table of Allotments, FM, Burns, WY	2430
Table of Allotments, FM, Centerville, UT	2615
Table of Allotments, FM, Coalinga, CA	2567
Table of Allotments, FM, Coeur d' Alene, ID	2523
Table of Allotments, FM, Columbia, Eldon, Centralia,MO	2510
Table of Allotments, FM, Copenhagen, NY	2572
Table of Allotments, FM, Dennysville, ME	2571
Table of Allotments, FM, Eagle Nest and Angel Fire, NM	2520
Table of Allotments, FM, Ellensburg, WA	2537
Table of Allotments, FM, Etowah and Jamestown, TN	2500
Table of Allotments, FM, Eufaula, AL	2541
Table of Allotments, FM, Fort Myers Villas, FL	2594
Table of Allotments, FM, Henderson, NY	2544
Table of Allotments, FM, Highlands, NC	2557
Table of Allotments, FM, Kekaha, HI	2522
Table of Allotments, FM, Kremmling, CO	2539
Table of Allotments, FM, L'Anse, MI	2433
Table of Allotments, FM, Lancaster, NH	2543

Case Name	Page
Table of Allotments, FM, Lawrenceburg, TN	2506
Table of Allotments, FM, Lawton, OK	2559
Table of Allotments, FM, Mesquite, NV	2494
Table of Allotments, FM, Montgomery, WV	2555
Table of Allotments, FM, Morton, TX	2427
Table of Allotments, FM, Moss Point, MS and Jackson, AL	2535
Table of Allotments, FM, Old Forge, NY	2499
Table of Allotments, FM, Osage City, KS	2425
Table of Allotments, FM, Pine Bluffs, WY	2428
Table of Allotments, FM, Prairie du Chien, WI	2553
Table of Allotments, FM, Rhinelander, WI	2432
Table of Allotments, FM, Waunakee, WI	2504
Table of Allotments, FM, Wichita Falls, TX	2519
Technical Flexibility Mobile Communications Services	2434
Technical Parameters for FM Allocation Rules	2477
Technical and Operational Regulations of Part 73	2480
Thomas, Robin B.	2547
Tom-Tom Communications, Inc.	2445
VHF Public Coast Stations	2562
WMHT Educational Telecommunications, Inc.	2551
Warmac Communications, Inc.	2526
Western Union Telegraph Company	2597
Woods Communications Group, Inc.	2450

Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 9

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 88-0317	2561	DA 88-0575	2510
DA 88-0396	2535	DA 88-0576	2491
DA 88-0423	2445	DA 88-0577	2466
DA 88-0424	2582	DA 88-0578	2468
DA 88-0445	2444	DA 88-0579	2469
DA 88-0447	2566	DA 88-0580	2465
DA 88-0478	2564	DA 88-0581	2470
DA 88-0497	2454	DA 88-0582	2473
DA 88-0510	2587	DA 88-0583	2494
DA 88-0519	2434	DA 88-0584	2511
DA 88-0528	2489	DA 88-0586	2512
DA 88-0532	2424	DA 88-0587	2513
DA 88-0533	2425	DA 88-0588	2545
DA 88-0535	2427	DA 88-0590	2539
DA 88-0540	2458	DA 88-0591	2541
DA 88-0542	2492	DA 88-0592	2543
DA 88-0543	2450	DA 88-0593	2544
DA 88-0547	2448	DA 88-0596	2519
DA 88-0548	2428	DA 88-0597	2520
DA 88-0549	2430	DA 88-0598	2522
DA 88-0550	2432	DA 88-0599	2572
DA 88-0551	2433	DA 88-0600	2523
DA 88-0554	2449	DA 88-0601	2524
DA 88-0555	2495	DA 88-0605	2547
DA 88-0556	2499	DA 88-0607	2548
DA 88-0557	2500	DA 88-0608	2585
DA 88-0558	2502	DA 88-0612	2549
DA 88-0559	2504	DA 88-0614	2551
DA 88-0560	2506	DA 88-0616	2546
DA 88-0561	2508	DA 88-0617	2516
DA 88-0564	2488	DA 88-0618	2588
DA 88-0565	2565	DA 88-0621	2573
DA 88-0566	2467	DA 88-0622	2574
DA 88-0567	2487	DA 88-0623	2575
DA 88-0568	2456	DA 88-0624	2594
DA 88-0569	2457	DA 88-0627	2557
DA 88-0570	2461	DA 88-0628	2559
DA 88-0571	2462	DA 88-0629	2615
DA 88-0572	2463	DA 88-0630	2553
DA 88-0573	2464	DA 88-0631	2555
DA 88-0574	2490	DA 88-0633	2567

Delegated Authority or FCC Number	Page
DA 88-0634	2569
DA 88-0635	2570
DA 88-0636	2571
DA 88-0645	2638
DA 88-0648	2576
DA 88-0651	2578
DA 88-0653	2581
DA 88-0603	2515
FCC 87-0368	2562
FCC 88-0057	2591
FCC 88-0066	2436
FCC 88-0100	2480
FCC 88-0128	2617
FCC 88-0137	2443
FCC 88-0138	2597
FCC 88-0139	2474
FCC 88-0141	2525
FCC 88-0142	2526
FCC 88-0143	2527
FCC 88-0145	2528
FCC 88-0146	2595
FCC 88-0147	2517
FCC 88-0149	2530
FCC 88-0150	2590
FCC 88-0151	2631
FCC 88-0152	2477
FCC 88-0161	2533
FCC 88R-024	2446
FCC 88R-025	2601

Table of Cases by Docket Number
Volume 3
Issue 9

Docket Number			Page
CC	Dkt.No.82 -	122	2597
CC	Dkt.No.85 -	166	2511
CC	Dkt.No.85 -	166	2638
CC	Dkt.No.85 -	388	2591
CC	Dkt.No.86 -	494	2515
CC	Dkt.No.86 -	497	2473
CC	Dkt.No.87 -	215	2631
CC	Dkt.No.88 -	136	2582
GEN	Dkt.No.85 -	171	2434
GEN	Dkt.No.87 -	389	2546
GEN	Dkt.No.88 -	96	2436
MM	Dkt.No.83 -	985	2527
MM	Dkt.No.83 -	1223	2526
MM	Dkt.No.84 -	927	2528
MM	Dkt.No.84 -	970	2525
MM	Dkt.No.84 -	1296	2617
MM	Dkt.No.85 -	41	2517
MM	Dkt.No.85 -	216	2533
MM	Dkt.No.85 -	396	2601
MM	Dkt.No.86 -	144	2477
MM	Dkt.No.86 -	155	2512
MM	Dkt.No.86 -	410	2510
MM	Dkt.No.86 -	410	2494
MM	Dkt.No.86 -	442	2495
MM	Dkt.No.86 -	499	2490
MM	Dkt.No.87 -	121	2444
MM	Dkt.No.87 -	177	2530
MM	Dkt.No.87 -	206	2500
MM	Dkt.No.87 -	240	2427
MM	Dkt.No.87 -	280	2432
MM	Dkt.No.87 -	292	2424
MM	Dkt.No.87 -	300	2523
MM	Dkt.No.87 -	331	2433
MM	Dkt.No.87 -	337	2524
MM	Dkt.No.87 -	341	2519
MM	Dkt.No.87 -	361	2571
MM	Dkt.No.87 -	377	2522
MM	Dkt.No.87 -	394	2543
MM	Dkt.No.87 -	420	2445
MM	Dkt.No.87 -	436	2520
MM	Dkt.No.87 -	465	2566
MM	Dkt.No.87 -	496	2446
MM	Dkt.No.87 -	499	2544
MM	Dkt.No.87 -	500	2572
MM	Dkt.No.87 -	501	2499
MM	Dkt.No.87 -	519	2570
MM	Dkt.No.87 -	535	2569
MM	Dkt.No.88 -	37	2449
MM	Dkt.No.88 -	56	2448
MM	Dkt.No.88 -	114	2480
MM	Dkt.No.88 -	124	2535
MM	Dkt.No.88 -	163	2425
MM	Dkt.No.88 -	168	2428
MM	Dkt.No.88 -	169	2430
MM	Dkt.No.88 -	173	2502
MM	Dkt.No.88 -	174	2504
MM	Dkt.No.88 -	175	2506
MM	Dkt.No.88 -	176	2508
MM	Dkt.No.88 -	177	2537
MM	Dkt.No.88 -	178	2539
MM	Dkt.No.88 -	179	2541
MM	Dkt.No.88 -	182	2492
MM	Dkt.No.88 -	183	2450
MM	Dkt.No.88 -	184	2567
MM	Dkt.No.88 -	185	2555
MM	Dkt.No.88 -	186	2553
MM	Dkt.No.88 -	187	2615
MM	Dkt.No.88 -	188	2559
MM	Dkt.No.88 -	189	2557
MM	Dkt.No.88 -	201	2549
MM	Dkt.No.88 -	202	2551
MM	Dkt.No.88 -	203	2547
MM	Dkt.No.88 -	204	2548
MM	Dkt.No.88 -	208	2585
MM	Dkt.No.88 -	80	2594
PR	Dkt.No.87 -	5	2467
PR	Dkt.No.87 -	132	2562

Table of Cases by Rulemaking Number
Volume 3
Issue 9

Rulemaking Number	Page	Rulemaking Number	Page
RM - 4864	2517	RM - 5852	2571
RM - 4999	2495	RM - 5867	2433
RM - 5069	2495	RM - 5879	2474
RM - 5193	2546	RM - 5963	2543
RM - 5199	2495	RM - 6015	2444
RM - 5250	2546	RM - 6024	2520
RM - 5397	2495	RM - 6025	2425
RM - 5420	2495	RM - 6034	2541
RM - 5428	2510	RM - 6050	2572
RM - 5469	2510	RM - 6051	2499
RM - 5497	2495	RM - 6053	2544
RM - 5498	2495	RM - 6072	2570
RM - 5575	2546	RM - 6073	2535
RM - 5584	2494	RM - 6116	2567
RM - 5625	2594	RM - 6118	2539
RM - 5688	2510	RM - 6164	2537
RM - 5702	2500	RM - 6215	2615
RM - 5704	2523	RM - 6216	2430
RM - 5722	2495	RM - 6217	2428
RM - 5771	2424	RM - 6218	2508
RM - 5779	2519	RM - 6246	2553
RM - 5783	2522	RM - 6248	2506
RM - 5785	2427	RM - 6249	2502
RM - 5787	2432	RM - 6283	2504
RM - 5788	2524	RM - 6284	2557
RM - 5792	2510	RM - 6287	2559
RM - 5806	2569	RM - 6288	2555

Table of Cases by City
Volume 3
Issue 9

City/State	Page
Albin, WY	2508
Angel Fire, NM	2520
Atlantic, IA	2569
Augusta, GA	2524
Austin, TX	2495
Austin, TX	2528
Bakersfield, CA	2525
Belton, TX	2495
Boulder, NV	2570
Brandon, VT	2502
Brenham, TX	2495
Brownwood, TX	2495
Buffalo, WY	2424
Burns, WY	2430
Cabool, MO	2510
Caldwell, TX	2495
Centerville, UT	2615
Centralia, MO	2510
Coalinga, CA	2567
Coeur d' Alene, ID	2523
Columbia, MO	2510
Columbia, LA	2450
Copenhagen, NY	2572
Cordele, GA	2512
Curwensville, PA	2547
Dennysville, ME	2571
Eagle Nest, NM	2520
Eldon, MO	2510
Ellensburg, WA	2537
Etowah, TN	2500
Eufaula, AL	2541
Eureka, IL	2548
Fargo, NC	2530
Fort Myers Villas, FL	2594
Henderson, NY	2544
Highlands, NC	2557
Huntington, TX	2585
Jackson, AL	2535
Jamestown, TN	2500
Kekaha, HI	2522
Killeen, TX	2495
Kirksville, MO	2492
Kremmling, CO	2539
L'Anse, MI	2433
Lancaster, NH	2543
Lawrenceburg, TN	2506
Lawton, OK	2559
Mesquite, NV	2494
Middletown, MD	2527
Minden, LA	2446
Montgomery, WV	2555
Morton, TX	2427
Moss Point, MS	2535
Mountain Grove, MO	2510
Old Forge, NY	2499
Oliver Springs, TN	2549
Orlando, FL	2533
Osage City, KS	2425
Pine Bluffs, WY	2428
Poughkeepsie, NY	2551
Prairie du Chien, WI	2553
Rapid City, SD	2445
Rhinelander, WI	2432
Round Rock, TX	2495
San Francisco, CA	2601
Springfield, FL	2526
Temple, TX	2495
Waunakee, WI	2504
West Lake Hills, TX	2495
Wichita Falls, TX	2519

Subject Index
Volume 3
Issue 9

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Failure to prosecute	2533
Financial qualifications	2601
Integration of ownership into management, effectuation	2525, 2527,
Misrepresentation and lack of candor	2601
Satellite operation	2526
Orders or Notices	
Multiple ownership	2450
New service v. expansion of existing service	2450
Oral argument	2450
Programming, specialized	2450
Reopening of record	2450
Amateur Radio Service (ARS)	
ARS - Licenses, examinations for operators'	
Authority to operate a station at a higher class, temporary	2465
Requirements, examination	2468
ARS - Licenses, operator	
Classes of licenses	2469
ARS - Operating requirements and procedures	
Auxiliary operation, requirements for	2466
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	2530
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2424, 2425, 2430, 2432, 2494, 2495, 2502, 2504, 2535, 2537, 2543, 2544, 2555, 2553, 2519, 2520, 2524, 2567, 2571, 2594

Subject	Page
Technical requirements	
Antenna height and power requirements	2477, 2530
Stations at spacings below minimum separation	2477
Broadcasting - TV Stations	
Services	
Aural and visual transmitters, operation of	2480, 2480
Technical considerations	
Transmitter location and antenna system	2480
Cable Television Service	
Rules	
Rate regulation by franchising authority	2617
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	2454
Delegations of authority - Chief, Private Radio Bureau	
Matters referred by Chief of Bureau to Commission en banc	2449
Communications Act of 1934	
Complaints to the commission	2458
Construction permits	2513
Extension of lines	2456, 2457, 2463, 2464, 2488, 2545,
Broadcasting	
Applications and Licenses-Actions and Conditions	2513
Common Carrier	
Hearings on proposed charges	2561
Miscellaneous provisions	
Unauthorized publication of communications	2595
Scope of the act	
Applications of the act	2458
Frequency Allocations and Radio Treaty Matters	
Allocation, assignment, and use of radio frequencies	
International and U.S. table of frequency allocations	2436
Maritime Services	
Frequencies - radiotelephony	
Public correspondence frequencies	2562

Subject	Page
Operational-Fixed Microwave Service, Private	
Technical standards	
Frequencies available, tables of assignments of	2467
Frequency bands, table of maximum authorized bandwidth for	2467
Power and frequency bands, table of	2467
Practice and Procedure	
Common carriers: applications	
Signatories, those eligible to be	2443
Common carriers: complaints, formal	
Motions to dismiss or edit complaints	2458
Hearing proceedings: appeal and reconsideration	
Final ruling, appeal from	2446
Hearing proceedings: participants and issues	
Hearing and appearances, notice of	2446
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	2525, 2527,
Reconsideration of a final FCC action, petition for	2530
Rulemaking proceedings: proceedings	
Reconsideration, petitions for	2597
Private Land Mobile Radio Services	
Technical standards	
Business radio service exemption	2434
Type acceptance	2434
Public Mobile Service	
Domestic public cellular radio telecommunications service	
Financial qualifications	2591
Technical standards	
Transmitters, procedure for and lists of type accepted	2434
Special Broadcast Services	
Low power TV and TV translator stations	
Channel assignments	2528
Remote pickup broadcast stations	
Equipment, type acceptance	2434
Statutory Citations Other than Communications	
Implementation of policy	2545
Public information; agency rules, opinions, orders	2590, 2595

Subject	Page
Tariffs (Schedules of Rates and Regulations)	
Specific tariff publications	
Tariff publication rejected by Commission	2588
Tariffs, contents of	2588
Telephone Company: Service Altered	
Extensions and supplements	
Applications, contents of	2456, 2457, 2463, 2464,

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	2454
000.331 Authority delegated.	2449
001.106 Petitions for Reconsideration	2530
001.106 Petitions for Reconsideration	2638
001.115 Application for Review	2525
001.115 Application for Review	2533
001.115 Application for Review	2527
001.221 Notice of appearance; hearing fee; failure to file;	2446
001.276 Appeal and review of S.D.	2445
001.302 Appeal, Late-Filed, Dismissal	2446
001.420 Procedures for amendment for TV Table of Allotments	2517
001.429 Petition for reconsideration	2597
001.731 Motions to Dismiss Complaints	2458
001.743 Who may sign applications	2443
001.773 Petition to Reject New Tariff Filing	2561
002.106 Table of Frequency Allocations.	2436
002.990 Alternative type acceptance (ATA) grant. *	2434
021.000	2474
021.501 Digital Termination Nodal Stations	2581
021.502 Frequencies	2581
021.505 Purpose and Permissible Service	2581
022.120 Type acceptance of transmitters	2434
022.917 Demonstration of Financial Qualifications	2591
036.379	2489
043.081 Reports of foreign-owned carriers Order, Internation	2515
061.017 corrections	2511
061.054(j) Composition of Tariffs	2588
061.069 Rejection	2588
061.308 Supporting Information to be Submitted with Letter o	2582
063.001 Contents of Applications	2456
063.001 Contents of Applications	2457
063.001 Contents of Applications	2461
063.001 Contents of Applications	2462
063.001 Contents of Applications	2463
063.001 Contents of Applications	2464
063.001 Contents of Applications	2470
063.001 Contents of Applications	2488
063.001 Contents of Applications	2573
063.001 Contents of Applications	2574
063.001 Contents of Applications	2575
063.001 Contents of Applications 300.214	2515
063.069 Contents of Applications to Close or Reduce Hours of	2578
065.820 Included Items	2473
069.005 Persons to be assessed	2631
073.202 FM Table of Allotments	2424
073.202 FM Table of Allotments	2425
073.202 FM Table of Allotments	2427
073.202 FM Table of Allotments	2428
073.202 FM Table of Allotments	2430
073.202 FM Table of Allotments	2432

073.202 FM Table of Allotments 2433
073.202 FM Table of Allotments 2494
073.202 FM Table of Allotments 2495
073.202 FM Table of Allotments 2500
073.202 FM Table of Allotments 2502
073.202 FM Table of Allotments 2504
073.202 FM Table of Allotments 2506
073.202 FM Table of Allotments 2508
073.202 FM Table of Allotments 2510
073.202 FM Table of Allotments 2519
073.202 FM Table of Allotments 2522
073.202 FM Table of Allotments 2523
073.202 FM Table of Allotments 2524
073.202 FM Table of Allotments 2535
073.202 FM Table of Allotments 2537
073.202 FM Table of Allotments 2539
073.202 FM Table of Allotments 2541
073.202 FM Table of Allotments 2553
073.202 FM Table of Allotments 2555
073.202 FM Table of Allotments 2567
073.202 FM Table of Allotments 2571
073.202 FM Table of Allotments 2615
073.202(b), FM Table of Allotments 2594
073.202, FM Table of Allotments 2499
073.202, FM Table of Allotments 2520
073.202, FM Table of Allotments 2543
073.202, FM Table of Allotments 2544
073.202, FM Table of Allotments 2557
073.202, FM Table of Allotments 2559
073.202, FM Table of Allotments 2569
073.202, FM Table of Allotments 2570
073.202, FM Table of Allotments 2572
073.211 Power and Antenna Height Requirements 2530
073.211 Power and antenna height requirements. 2477
073.213 Grandfathered short-spaced stations. 2477
073.315 2444
073.316 2444
073.3522 Amendment of Applications 2530
073.3527 Local public inspection file of noncommercial educa 2490
073.653 Operation of TV aural and visual transmitters 2480
073.663 Determining operating power 2480
073.685 Transmitter location and antenna system 2480
073.909 Standard Operating Procedures (SOP's) 2491
074.451 Type acceptance of equipment 2434
074.702 LPTV Channel Assignments 2528
076.033 Rate regulation standards 2617
080.371 Public correspondence frequencies 2562
090.203 Type acceptance required 2434
090.217 Exempt from technical standards 2434
094.065 Frequencies. 2467
094.071 Emission and bandwidth limitations. 2467
094.073 Power limitations. 2467
097.005 Classes of operator licenses 2469
097.023 Examination requirements 2468

097.023 Examination requirements 2516
097.035 Temporary operating authority 2465
097.086.Auxiliary operation 2466
300.152 Application of Act 2458
300.204 Hearing as to Lawfulness of New Charges, Suspension 2561
300.208 Complaints to the Commission 2458
300.214 Extension of Lines 2456
300.214 Extension of Lines 2457
300.214 Extension of Lines 2461
300.214 Extension of Lines 2462
300.214 Extension of Lines 2463
300.214 Extension of Lines 2464
300.214 Extension of Lines 2470
300.214 Extension of Lines 2487
300.214 Extension of Lines 2488
300.214 Extension of Lines 2545
300.214 Extension of Lines 2573
300.214 Extension of Lines 2574
300.214 Extension of Lines 2575
300.214 Extension of Lines 2578
300.309 Action Upon Appl., Form of Conditions Attached to Li 2513
300.319 Construction Permits 2513
300.415 Limitations as to Actions 2576
300.605 unauthorized publication of communications 2595
400.05552 Public Information; agency rules, opinions, order 2595
400.05552(b)(7)(A)&(D), Public Information; agency rules 2590
400.201 Implementation of Policy 2545
400.401 Applicability of Communications Act of 1934 2545
500.110 Minimum Separations 2450
500.112 Air Hazard 2450
500.124 Satellite 2450
500.140 Comparative 2450
500.150 Ultimate 2450
500.3005 Integration of Ownership into Management, Qualitati 2527
500.3035 Integration of Ownership into Management, Quantitat 2527
500.3040 Integration of Ownership into Management, Questions 2525
500.3053 Due process 2526
500.3110 Failure to Prosecute 2533
500.3125 Misrepresentation 2601
500.3148 Remand 2526
500.3170 Financial Qualifications 2601
500.3175 Administrative finality 2526
(AGH Communications, Inc.)(Eureka, Illinois) 2548
(Charles E. Phillips)(Oliver Springs, Tennessee) 2549
(Jerry Swink)(Huntington, Texas) 2585
(Robin B. Thomas)(Curwensville, Pennsylvania) 2547
(WMHT Educational Telecommunications, Inc.)(New Paltz, New Y 2551
Computer III Requirements 2564
Computer III Requirements 2587
Extension of lines 2515
Jurisdictional Separations Procedures 2489
Part 15 2546
Uniform System of Accounts 2489

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-292

In the Matter of

Amendment of Section 73.202(b), RM-5771
Table of Allotments,
FM Broadcast Stations.
(Buffalo, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 25, 1988 **Released: April 25, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 4783 (1987), issued at the request of Communications Systems III (petitioner), licensee of Station KLGT(FM), Channel 224A, Buffalo, Wyoming, proposing the substitution of Channel 225C for Channel 224A and modification of its license to specify operation on the higher class channel. Petitioner filed supporting comments reiterating its intention to upgrade the station's facilities.

2. We conclude that the public interest would be served by the channel substitution at Buffalo, providing a first wide coverage area FM service. The substitution can be made in compliance with the Commission's minimum separation requirements using the petitioner's current site (44-19-44 and 106-41-33). In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KLGT(FM) to specify operation on Channel 225C.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Buffalo, Wyoming	225C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KLGT(FM), Buffalo, Wyoming, IS MODIFIED, to specify operation on Channel 225C in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section

1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-163

In the Matter of

Amendment of Section 73.202(b), RM-6025
Table of Allotments,
FM Broadcast Stations.
(Osage City, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 25, 1988; Released: April 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Osage Radio, Inc. (petitioner), licensee of Station KZOC(FM), Channel 224A, Osage City, Kansas, the Commission has before it for consideration a petition for rule making seeking the substitution of Channel 225C2 for Channel 224A at Osage City and modification of its license to specify operation on the higher class channel. Petitioner submitted information in support of the proposal.

2. We believe the proposal warrants consideration based on petitioner's expressed desire to provide Osage City with its first wide area FM service. The channel can be allocated in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided Station KTGL, Channel 225C1, Beatrice, Nebraska, relocates its transmitter site in accordance with a construction permit issued by the Commission (BPH 86123OIC).[1] Since this allotment is contingent on the grant of the Beatrice license at the new site, we shall withhold final action in this proceeding until the license grant occurs. As requested, we shall propose to modify the license of Station KZOC(FM) from Channel 224A to specify operation on Channel 225C2. In accordance with Section 1.420(g) of the Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel.

3. Accordingly, in order to provide Osage City with its first wide area coverage FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Osage City, Kansas	224A	225C2

4. IT IS ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice* to the following:

The Meg Company
200 Sherman Street
Beatrice, Nebraska 68310
(BPH 861230IC)

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 16, 1988,** and reply comments on or before **July 1, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

William D. Silva, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20006
(Counsel to Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used for Channel 225C2 at Osage City are as follows: 38-33-42; 95-52-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-240

In the Matter of

Amendment of Section 73.202(b), RM-5785
Table of Allotments,
FM Broadcast Stations.
(Morton, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 25, 1988; Released: April 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of James S. Bumpous (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 4235 (1987), proposing the allocation of Channel 249C1 to Morton, Texas, as that community's first local FM service. No comments were received from the petitioner or any other party.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allocated. It is the Commission's general policy to refrain from making a new allocation to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of James S. Bumpous requesting a channel allotment at Morton, Texas, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-168

In the Matter of

Amendment of Section 73.202(b), RM-6217
Table of Allotments,
FM Broadcast Stations.
(Pine Bluffs, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 30, 1988; Released: April 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. Robert Jason (petitioner) has before the Commission for consideration a petition for rule making seeking the allocation of Channel 287C2 to Pine Bluffs, Wyoming, as that community's first local FM service. Petitioner has stated his intention to apply for the channel, if allotted.

2. Channel 287C2 can be allotted to Pine Bluffs in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.8 kilometers (4.9 miles) northwest of the city.[1] This restriction is necessary to avoid a short spacing to the construction permit (BMPH830705AS) for Station KMXX(FM), Channel 288A, at Sterling, Colorado.

3. In view of the fact that Pine Bluffs, Wyoming, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Pine Bluffs, Wyoming	---	287C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 16, 1988,** and reply comments on or before **July 1, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Daniel F. Van Horn, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D. C. 20036-5339
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposed site are 41-13-41 and 104-07-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-169

In the Matter of

Amendment of Section 73.202(b), RM-6216
Table of Allotments,
FM Broadcast Stations.
(Burns, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 30, 1988; Released: April 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Gary Albarez (petitioner), seeking the allocation of Channel 270C2 to Burns, Wyoming, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 270C2 can be allotted to Burns in compliance with the Commission's minimum distance separation requirements with a site restriction. A site restriction of 12.5 kilometers (7.8 miles) southwest of the community is necessary in order to avoid short spacings to Station KPNY(FM), Channel 271C1 at Alliance, Nebraska and a construction permit for Station KELL(FM), (Channel 267C) at Bridgeport, Nebraska.[1]

3. In light of the fact that Burns, Wyoming, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Burns, Wyoming	---	270C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 16, 1988,** and reply comments on or before **July 1, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Daniel F. Van Horn, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D. C. 20036-5339
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposed site are 41-07-05 and 104-28-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-280

In the Matter of

Amendment of Section 73.202(b), RM-5787
Table of Allotments,
FM Broadcast Stations.
(Rhinelander, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1988; Released: April 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Oneida Broadcasting Company (petitioner), licensee of Station WRHN(FM), Channel 262C2, Rhinelander, Wisconsin, the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 4608 (1987), proposing the substitution of Class C1 Channel 262 for Channel 262C2 and modification of its license to specify operation on the higher class channel. Petitioner submitted supporting comments reaffirming its intention to improve its facilities.

2. The substitution of the higher class co-channel can be made consistent with the Commission's minimum separation requirements at the petitioner's present site (45-38-08 and 89-22-42), which is located 3.1 kilometers (1.9 miles) east of Rhinelander. Since the community is located within 320 kilometers (200 miles) of the U. S.-Canadian border, the Canadian government has concurred.

3. We believe the public interest would be served by the substitution of Channel 262C1 for Channel 262C2 at Rhinelander, Wisconsin, providing expanded FM service to that community. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WRHN(FM) to specify operation on Channel 262C1.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Rhinelander, Wisconsin	248C1, 262C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WRHN(FM), Rhinelander, Wisconsin, IS MODIFIED, to specify operation on Channel 262C1 in lieu of Channel 262C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section § 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-331

In the Matter of

Amendment of Section 73.202(b), RM-5867
Table of Allotments,
FM Broadcast Stations.
(L'Anse, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1988; Released: April 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5330 (1987), in response to a petition filed by Aaron J. Coffee (petitioner). The *Notice* proposed the allotment of FM Channel 291C2 to L'Anse, Michigan, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel. No other comments were received.

2. Channel 291C2 can be allocated to L'Anse, Michigan, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] Since the allotment of Channel 291C2 to L'Anse is within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that the proposed allocation could provide a first FM broadcast service to L'Anse, we believe the public interest would be served by a grant of the petitioner's request.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 9, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
L'Anse, Michigan	291C2

5. The window period for filing applications will open on **June 10, 1988,** and close on **July 11, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for the L'Anse reference point are 46-45-18 and 88-27-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 85-171

In the Matter of

Technical Flexibility in the
Mobile Communications Services,
Rules Parts 2, 22, 74, and 90.

ERRATUM

Released: April 27, 1988

The Commission's Notice of Proposed Rule Making, FCC 88-65, adopted February 25,1988, and released March 22, 1988 is corrected as follows:

In paragraph 3. The fifth sentence should read: The characteristics of a "standard" FM land mobile receiver were proposed in the Notice [italicized] along with specific test methodology to determine the interference potential of the new technology equipment.

In paragraph 12, the third sentence should read: The ATA grant will indicate the number of multiple collocated transmitters permitted in an FM land mobile channel.

In paragraph 17, The first sentence should read: Except as noted below, we propose that permission to use ATA equipment be given to 1) licensees in the Public Mobile Service 2) Broadcast Remote Pickup licensees; and 3) Private Land Mobile Radio Service licensees.

In paragraph 20: In view of the foregoing and pursuant to Sections 4(i), and 303(r) of the Communications Act of 1934 as amended 47 U.S.C. Sections 154(i), 154(j) and 303(r), it is proposed to amend Parts 2, 22, 74, and 90 as set forth in APPENDIX A below.

In APPENDIX A, Under Section 22.120(e), the first sentence should read: In addition to type accepted transmitters employing conventional modulation, a licensee of a land mobile radio channel, except those in a Cellular Radiotelephone Service and those in a shared UHF television channel may use transmitters granted alternative type acceptance (ATA) under Section 2.990.

In APPENDIX B, paragraph 4 sentence 1 should read: 4. The two FM receivers were tested with the following ATA-type signal configurations:

Two carriers with center frequencies at the channel center frequency plus 1.5 kHz, each double sideband reduced carrier amplitude modulated with 400 Hz.

Two carriers, one centered in the channel, one at the center frequency less 1 kHz, both double sideband reduced carrier amplitude modulated with 400 Hz.

In APPENDIX B, after the first sentence insert the following sentence: The measured SINADS were 17 dB, 13 dB, 14 dB, 15 dB, and 16 dB, respectively.

APPENDIX A, append the attached Figure 1.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

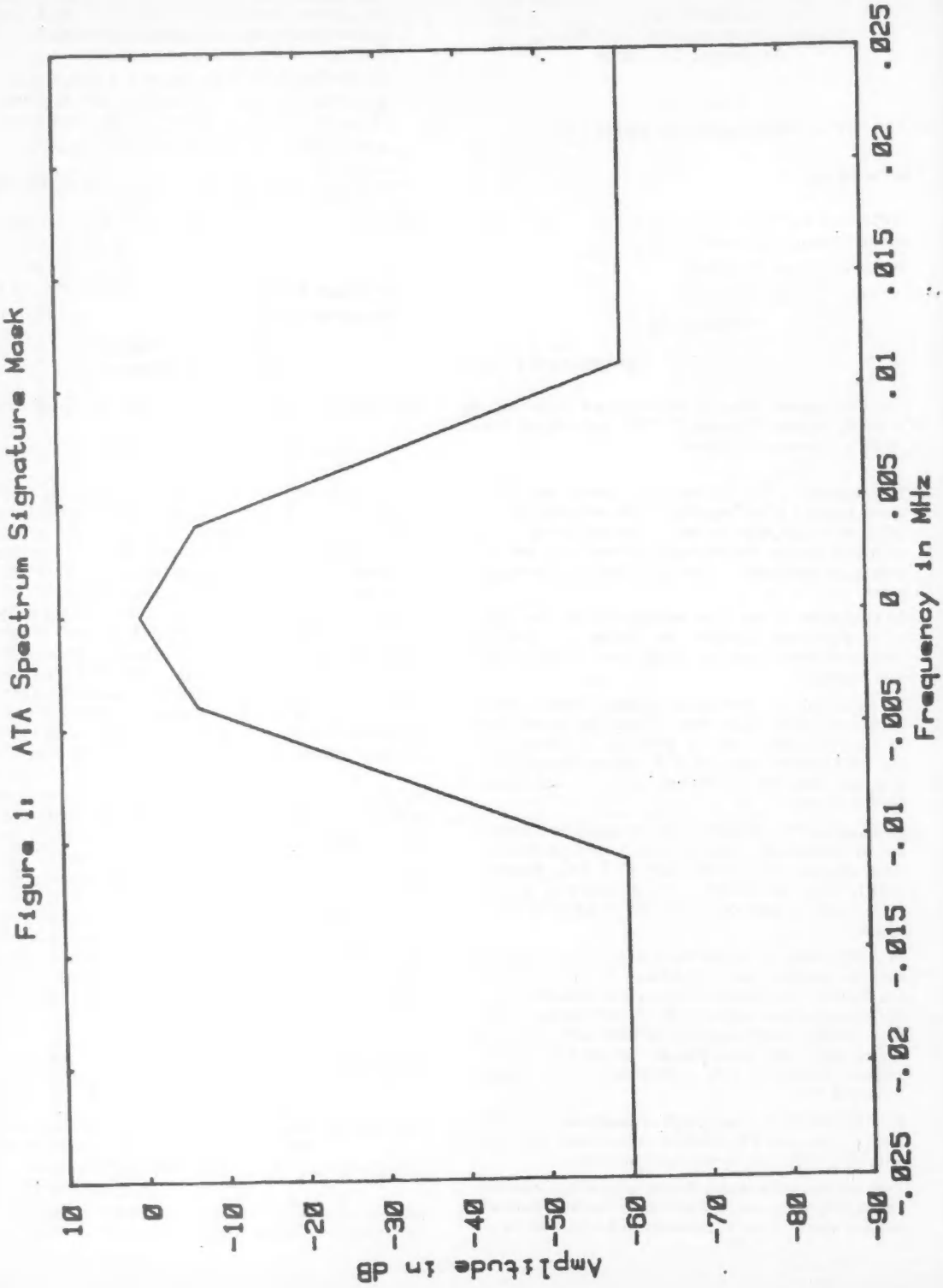
Figure 1: ATA Spectrum Signature Mask
Amplitude in dB
10
0
-10
-20
-30
-40
-50
-60
-70
-80
-90
-.025
-.02
-.015
-.01
-.005
0
.005
.01
.015
.02
.025
Frequency in MHz

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-96

In the Matter of

Amendment of the Commission's Rules
Relative to Allocation of the
849-851/894-896 MHz Bands

NOTICE OF PROPOSED RULE MAKING

Adopted: February 25, 1988; Released: April 27, 1988

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend Parts 2 and 22 and/or Parts 2 and 90 of its Rules to permit use of four megahertz of reserve spectrum at 849-851/894-896 MHz for an air-to-ground telephone interconnected service. This action also proposes licensing policies and technical guidelines for the air-to-ground service.

BACKGROUND

2. In the *Report and Order* adopted on July 24, 1986, in General Docket Nos. 84-1231, 84-1233 and 84-1234 (hereinafter *Allocation Order),* the Commission allocated 28 megahertz of 800/900 MHz land mobile reserve spectrum to various services, but left the 849-851/894-896 MHz bands temporarily unallocated. The Commission stated that the 849-851/894-896 MHz bands would be considered for either a joint Canadian/United States mobile satellite system or a variety of other possible services. The two services specifically mentioned were Basic Exchange Telecommunications Radiotelephone Service (BETRS) and air-to-ground telephone service.[1]

3. On December 18, 1986, the Commission proposed to establish BETRS to serve rural fixed telephone needs using either existing Rural Radio Service frequencies, 800 MHz cellular radio frequencies, or 800 MHz private radio frequencies.[2] On December 10, 1987, final rules were adopted for the service, permitting BETRS on a co-primary basis on both Rural Radio Service frequencies and on 50 private radio frequency pairs at 816-820/861-865 MHz.[3] Thus, the 849-851/894-896 MHz bands are not required for BETRS.

4. On September 17, 1987, the Commission adopted a *Memorandum Opinion and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234 affirming on reconsideration the allocation decisions of the *Allocation Order.*[4] In Petitions for Reconsideration of the *Allocation Order,* interest was expressed in the four megahertz of spectrum remaining in reserve. In particular, GTE Airfone, Inc. (Airfone) petitioned the Commission to allocate this four megahertz immediately for air-to-ground telephone service. In denying Airfone's petition, the Commission stated that the record was insufficient to allocate the four megahertz at that time. However, the Commission indicated that a rule making proceeding would be initiated to explore more fully possible candidate services for this spectrum.

DISCUSSION

5. The United States and Canadian Governments have held extensive discussions on possible use of the 849-851/894-896 MHz bands as an adjunct to a joint United States/Canadian mobile satellite system operating at L-band (1545-1558.5/1646.5-1660 MHz). At this time there appears to be little prospect of agreement on use of the four megahertz in a joint system. Nevertheless, we remain convinced, as stated in the *Memorandum Opinion and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, that a joint United States/Canadian mobile-satellite system can be implemented entirely in the L-band.[5] We therefore conclude that the 849-851/894-896 MHz bands are better allocated for other purposes.

6. In addition, we are disinclined to allocate this spectrum for specific services that have already received an allocation from the land mobile reserve. In particular, we have already allocated spectrum in the 800/900 MHz region for the cellular service and the private land mobile services, including public safety services. We have taken several actions to ensure that additional requirements for these services are satisfied first by implementing spectrum efficiency in the existing 800/900 MHz allocations rather than through allocation of additional spectrum.[6]

7. For the reasons discussed below, we believe the best use of the remaining four megahertz of 800/900 MHz spectrum is for air-to-ground service interconnected with the Public Switched Telephone Network (PSTN).[7] There are a number of benefits of this service. Access to a telephone while en route is extremely useful. For example, passengers can call ahead to adjust travel arrangements. Business travelers can stay in close contact with their offices. We are also aware that in many instances air-to-ground service has been used in medical emergencies to communicate with medical personnel and provide remote EKGs. In short, an air-to-ground telephone service would provide easily accessible and highly useful communications to the more than 400 million passengers who travel on U.S. domestic airlines each year.[8] We therefore believe that an air-to-ground service in the remaining four megahertz of 800/900 MHz reserve spectrum would be in the public interest. We also seek comment on whether the public interest would be better served under a more general mobile service allocation. Such an allocation could permit air-to-ground or other types of mobile communications. Commenters favoring such an approach should address the licensing policies, technical restrictions, etc., that would apply to such an allocation. Comments are also requested on whether a combination of approaches would be appropriate. For example, this could include separate two megahertz allocations to traditional air-to-ground service and the more flexible general mobile service.

8. As detailed below, we are proposing policies and minimal regulations necessary to implement an air-to-ground service. In making these proposals we have two general concerns. First, we wish to ensure that the service is provided in an expeditious manner with minimal governmental intrusion. Second, given the substantial demand and relatively small amount of spectrum available for the

service, we seek to ensure that the spectrum is used as efficiently as practicable. These matters are discussed below.

Licensing Policies

9. The implementation of an air-to-ground PSTN interconnected service presents several questions with regard to how the service is to be structured and how many licensees are to be selected to offer this service. As an initial matter, we believe it is in the public interest to ensure that this service is available on a nationwide basis so that the greatest number of air travelers can benefit from this service.[9] Consequently, we have initially concluded that licensees should be required to offer nationwide service.[10] It has been our experience that the public interest is best served by competition in the provision of radio services. Competition generally results in better service and lower rates to the public. However, in this case, there are technical and economic considerations to weigh in determining whether competitive air-to-ground PSTN interconnected systems are in the public interest and the extent to which competitive systems can be accommodated within the available spectrum resource.

10. The ability of the four megahertz to satisfy anticipated demand may be limited by the efficiency with which it is used.[11] While we anticipate use of spectrum efficient technology for air-to-ground systems, overall spectrum efficiency may be reduced if the spectrum were divided among several licensees.[12] However, the penalties do not appear to be substantial for two systems of two megahertz each, but would appear to become more severe if the four megahertz were divided further.[13]

11. We are also concerned about the impact on economic viability of the service if the four megahertz were divided among two or more competing systems. In order for the service to attract the necessary investment, there must be a reasonable prospect of long-term profit. We recognize that separate systems may require the establishment of separate ground networks. However, it appears that the cost of the equipment on the ground represents a relatively small portion of the long-term costs of an air-to-ground telephone system. The majority of system costs appear to be associated with the equipment aboard the aircraft, primarily because installation is expensive and because there are many more aircraft than ground stations. Thus, the cost of separate systems may not be markedly greater than the cost of a single integrated system, although we recognize that research and development, personnel, real estate, and other costs must also be taken into account.

12. On balance, we are tentatively proposing to authorize two separate nationwide air-to-ground systems of two megahertz each. We recognize from a purely technical point-of-view it may be more advantageous to authorize only a single air-ground system; however, we believe that the presence of competing systems will ultimately produce a more desirable service to consumers. In this respect, our proposal herein is similar to the final rules adopted for the cellular radio service. There we provided for two cellular operators to be authorized in each metropolitan area, despite evidence that a single operator would have been technically more efficient.[14] If our proposal is ultimately adopted, we anticipate that competition for passengers among the airlines will spur the development of new features and lower prices as airlines promote their air-to-ground PSTN interconnected service to attract passengers.[15]

13. We recognize, however, that the proposed allocation of only two megahertz per system may be limiting. Comments are requested specifically on any technical difficulties that may be caused by our proposal to establish two systems. We also invite comments on whether separate systems of two megahertz each can generate sufficient revenue to be economically viable in view of research and development costs and the need to establish and maintain two different ground networks. Commenters should support their arguments on technical impairments or economic viability with appropriate analyses. Commenters that believe the proposed licensing policy is not feasible should suggest alternative approaches.

Regulatory Issues

14. It appears that air-to-ground PSTN interconnected service could be offered either as a common carrier service or as a private telecommunications service.[16] Each of these options is discussed below. In either case, we believe that the offerings would not be subject to state entry or rate regulation, as explained below.

15. It may be appropriate to offer air-to-ground service as common carrier service. Common carriers must generally provide the interconnected offering indiscriminately, by choice or obligation. Thus, under this scenario the service would be provided to any passenger without first contracting with the service provider. A common carrier typically does not operate under individualized medium to long term contracts with clients.[17]

16. On the other hand, depending on the manner in which the service is structured, air-to-ground PSTN interconnected service might be construed as a non-essential service and thus not subject to regulation as a common carrier. It is conceivable, for example, that the service could be offered on a restricted basis by the airline or where the supplier establishes accounts that are individually negotiated and styled to meet the needs of particular user groups. Under these conditions the service may be construed as private carriage based on the criteria delineated in *NARUC I*, 525 F.2d at 642-45.[18]

17. We therefore request comment on the regulatory structure that should be applied to this service. Commenters are requested to address whether the service should be treated as common carriage under Title II of the Communications Act or as private carriage. Commenters recommending private carrier treatment should consider whether the air-to-ground service can be considered a land mobile service within Sections 3(gg) of the Communications Act, 47 U.S.C. Sections 3(gg) and 332, or whether the indicia stated in NARUC I should apply, as well as, whether and why the relevant criteria are met. Also, commenters favoring private carriage should specify criteria for eligibility to construct and operate this service. We anticipate that, if this service were established as a private service, parties that otherwise offer common carrier services (among others) would be eligible to offer air-to-ground PSTN interconnected service as a private service.

18. If the service is classified as a common carrier service it would be subject to regulation under existing statutes. As previously discussed, the service will be nationwide in scope and will therefore feature predomi-

nantly interstate messages. Moreover, the nature of air travel, in which an aircraft may pass rapidly over parts of several states in the course of a single flight, appears to make it impossible to separate the interstate and intrastate air-to-ground messages for purposes of assigning federal and state jurisdiction to regulate rates, conditions of entry and exit, and technical and operational standards. Depending on flight path and the deployment of ground stations for the air-to-ground system, even a call placed on a nominally intrastate flight could actually be an interstate communication. For example, a call to a New York number from an airliner on a flight from New York City to Albany, New York, could be interstate if the airliner were passing over Connecticut or New Jersey. In addition, the jurisdictional nature of a single call could change as the plane travelled over state boundaries, confounding attempts to define the call as interstate or intrastate. Furthermore, it does not appear that the ground station could determine the precise location of a calling party to identify the jurisdictional nature of a particular call or that a particular ground station in the state being traversed would be utilized if there were a more favorable propagation path to a ground station in a neighboring state.[19][20]

19. Accordingly, if the service were to operate as a common carrier service, we propose to preempt state authority over rates, conditions of entry and exit, and technical and operational standards for the air-to- ground interconnected service. Such preemption would be consistent with our reasons for preempting state regulation of nationwide paging systems.[21] In order to perform a complete analysis of this topic, we request comment on the practicability of separating interstate and intrastate air-to-ground messages for regulatory purposes. Parties that disagree with the discussion in this paragraph should state with particularity why they disagree and should propose alternative models for state and federal regulatory authority over their services.[22]

20. With regard to rate regulation, we note that competition is expected in the provision of air-to-ground PSTN interconnected service. As indicated earlier, we are proposing to license two nationwide competitive systems. Furthermore, we note that passenger telephone service could also be offered by MSS in the future.[23] We believe that this competition will result in rates that are attractive to consumers. Moreover, if rates are not in line with consumer demand, we expect many consumers will simply choose not to use the service and will instead hold off making calls until they land. In these circumstances, where the service is not an essential monopoly service and where there are competitive alternatives, application of the full range of consumer protections afforded by Title II of the Communications Act of 1934, as amended, 47 U.S.C. Sections 201-224, might not be necessary. Commenters recommending common carrier treatment should address the issue of whether the Commission should forbear from rate regulation or apply streamlined regulation under the policies established in the Commission's *Competitive Carrier Rule Making*.[24] On the other hand, if the service were established as a private service, rate regulation would clearly not apply and thus may make the service more flexible in responding to market conditions than may be possible under common carrier regulation.

Technical Considerations

21. Our primary concerns in proposing technical guidelines for the air-to-ground service are that the service operate with maximum spectrum efficiency and that it operate on a non-interference basis with adjacent services. In keeping with our general policy of establishing regulations only where necessary, we are not proposing detailed technical standards. A variety of technical designs may be compatible with our goals.[25] This approach is consistent with our action with respect to the mobile-satellite service.[26]

22. Regarding interference control, since we plan to issue only two air-to-ground licenses it does not appear necessary to establish in-band technical standards. Rather, we believe that such standards can be better determined by the licensees. However, we invite comment on this matter. We note that Airfone's experimental service operates with ground stations utilizing 100 watts effective radiated power (ERP) and airborne stations utilizing 10 watts ERP. We also invite comment on what standards should be applied for emissions outside the four megahertz band. We are particularly concerned about potential interference to the cellular and private land mobile services which operate in the frequency bands adjacent to those we are proposing for air-to-ground service. We are proposing to use the 849-851 MHz band for the ground-to-air link and 894-896 MHz band for the air-to-ground link in order to minimize potential interference that can be caused by Government ship stations operating in the radiolocation service in the 890-928 MHz band.[27][28]

Ancillary Services

23. We anticipate that there may be frequencies that cannot be used for air-to-ground service in certain geographic areas because, for example, separation criteria for frequency reuse cannot be satisfied. It is conceivable, however, that this spectrum could be put to other uses locally. We view this situation as somewhat parellel to that in the cellular radio service, where we recently proposed to allow cellular radio operators additional service options. Under this proposal licensees would be required to continue to provide cellular service, but could use cellular spectrum to offer ancillary services as well.[29] We believe that it may also be desirable to permit ancillary services to be offered in the proposed air-to-ground service frequency bands.

24. We are therefore soliciting comments on the option of permitting air-to-ground licensees to offer ancillary services, provided that air-to-ground PSTN interconnected service is not compromised. Air-to-ground licensees would be responsible for all ancillary operations and would be required to eliminate any interference that may be caused to other services. By permitting ancillary services we anticipate that this spectrum can be put to its fullest use. We seek comments on what restrictions or conditions, if any, should be imposed under this option. If the basic air-to-ground service is regulated as a private telecommunications service, we would anticipate that licensees would essentially operate similar to Specialized Mobile Radio (SMR) Service licensees and could on an ancillary basis provided a broad range of additional services such as paging, dispatch, digital or other services. On the other hand, if the air-to-ground service is regulated as a common carrier service, the restrictions in Section 331 of the Communications Act of 1934, as amended, 47 U.S.C. Section 332(c)(2) prohibiting dispatch may apply.

Application Procedures and Selection Criteria

25. In the interests of moving expeditiously towards establishing this service, we are proposing application procedures and criteria for selection of licensees. We intend to solicit applications simultaneous with the adoption of final rules, and following receipt of applications hope to move promptly to issue licenses authorizing air-to-ground service. It is our intent to consider all qualified applicants for this service. We have initially determined that there are three specific areas that may be used as qualifying criteria for applicants. These areas are: 1) financial qualifications, 2) technical qualifications, and 3) service availability. We intend to require that applications contain complete information on each of these areas.

26. We are inclined to use comparative hearings to select licensees. If we elect to establish air-to-ground PSTN interconnected service as a common carrier service, we propose to employ the existing procedures in Part 22 of our rules for dealing with comparative evaluation of mutually exclusive applications. *See* 47 CFR Section 22.35. Alternatively, if we establish air-to-ground PSTN interconnected service as a private service, we intend to apply the application procedures in Part 1 Subpart F. *See* 47 CFR Section 1.973. In either case, we invite comment on whether applicants should be given comparative preferences based on experience or other factors. Commenters may also address whether, by rule, we should establish a dispositive eligibility preference for any applicant.[30] (cf. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)). In this connection, we note Airfone is currently operating an experimental air-to-ground service.

27. We believe it appropriate for applicants to demonstrate that they have available the financial resources necessary to construct and operate the system. The availability of resources is directly related to the ability of an applicant to establish the service, to do so promptly, and to maintain the service. In this connection, we will request that applicants provide full particulars regarding the cost of construction and operation of the proposed facilities, together with other initial expenses and discuss the degree of risk involved. They will also be requested to demonstrate the financial ability to meet these expenses, including a balance sheet in support of the proposed facilities, income statement for the first year of operation, and details of any loans or other credit arrangements. We solicit comment on whether, as a condition of issuance of a license, the Commission should require that monies be placed in escrow, and if so, what amount would be appropriate.[31]

28. Another area we believe should be decisional in selecting applicants is technical qualifications. In particular, we believe that spectrum efficiency should be a factor in choosing an applicant. Use of spectrum efficient techniques will enhance the availability of this service so that long-term demand for this service, especially during peak periods, can be accommodated within the four megahertz of spectrum that is available. Accordingly, we will favor systems that employ spectrum efficient techniques such as narrow channel bandwidths (i.e., six kilohertz or less), frequency reuse and trunking. Applicants will be requested to provide a complete technical description of their systems along with a discussion of the spectrum efficient features of their systems. We invite comment on what engineering criteria or standards might be used to compare the spectrum efficiency of different systems. We will also request technical information analyzing any potential for interference.

29. We also tentatively find it appropriate to consider the planned service availability including such factors as quality of service, geographic coverage area, and implementation schedule of the proposed service. We believe it is in the public interest to favor systems that will offer a high quality of service. Quality of service can be described in terms such as blocking rate and signal-to-noise ratio. We also propose to give preference to applications that seek to make this service available on a nationwide basis, if feasible, including Alaska, Hawaii, and U.S. possessions. Finally, we are inclined to favor applications for systems that will be constructed and put into operation in a rapid fashion so that the public is given access to this service as soon as practicable. Accordingly, we propose to request that applications contain information describing the planned service availability including the quality of service, coverage area, and implementation schedule.

30. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for Action

This action is being initiated on the Commission's own motion as a follow up to final Commission action in General Docket Nos. 84-1231, 84-1233, and 84-1234, which allocated 28 megahertz of 800/900 MHz land mobile reserve spectrum to various services, but left the 849-851/894-896 MHz bands temporarily unallocated. The *Report and Order* in those proceedings stated that these bands would be considered for a number of services, including an air-to-ground radiotelephone service. We have determined that an air-to-ground service would be the most productive use of this spectrum.

II. Objective

The objective of this proposal is to satisfy demand for a high-quality, public radiotelephone service aboard commercial aircraft. An experimental air-to-ground service operated by GTE Airfone, Inc. has been very well-received by the public, and Airfone's data indicate that there remains substantial unsatisfied demand for such a service.

III. Legal Basis

The proposed action is authorized under Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These sections authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio in the public interest.

IV. Description, Potential Impact and Number of Small Entities Affected

This proposal may provide marketing opportunities for radio manufacturers, some of which may be small businesses. Beyond this we do not believe there would be any significant effects on small entities. We invite specific comments on this point by interested parties. Additionally, IT IS ORDERED that the Secretary shall serve a copy of this *Notice* on the Small Business Administration.

V. Reporting, Record Keeping and other Compliance Requirements

As discussed above, there are several options available to the Commission for regulation of this new service. It is unclear at this time what specific compliance requirements will be adopted.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule None.

VII. Significant Alternatives

This proposal would create a new air-to-ground PSTN interconnected service. We are proposing only general operational and technical parameters for the service. Therefore, our proposal allows for maximum flexibility in determining the specific air-ground systems which will eventuate. We will not solicit applications to operate the service until rules and policies are finalized.

31. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

32. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period.[32] *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in this matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

33. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

34. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). Interested persons may file comments on this proposal on or before ***July 1, 1988***, and reply comments on or before ***August 1, 1988***. All relevant and timely comments filed in accordance with Sections 1.415 and 1.419 of our rules and regulations (47 C.F.R. Sections 1.415 and 1.419) will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the Commission's reliance on such information is noted in its final decision.

35. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 C.F.R. Section 1.419, formal participants shall file an original and five copies of their comments and other material. Participants wishing each Commissioner to have a personal copy of their comments should file an original and eleven copies. Members of the general public may express their comments without regard to form (as long as the docket number is clearly stated in the heading). All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D. C.

36. For further information concerning this rule making contact Mr. Rodney Small at (202) 653-8116, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] *See Report and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986), at para. 157.

[2] *See Notice of Proposed Rule Making* in CC Docket No. 86-495, 2 FCC Rcd 326 (1987).

[3] *See Report and Order* in CC Docket No. 86-495, 53 Fed. Reg. 3210 (February 4, 1988).

[4] *See Memorandum Opinion and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 6830 (1987).

[5] *See Memorandum Opinion and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, *supra*, at para. 27. We note also that a mobile-satellite system that would operate in both the L-band and the 849-851/ 894-896 MHz bands may be significantly more costly than a system operating solely at L-band. In particular, a separate antenna may be required on the spacecraft for the 800 MHz spectrum. These costs, which would be imposed on the United States licensee of the mobile-satellite service, and ultimately consumers of this service, are not warranted by the minimal benefit to the United States.

[6] *See* generally: 1) *Allocation Order, supra*, at paras. 53-77 implementing 12.5 kHz channels and trunking in the private land mobile service allocation at 896-901/935-940 MHz, 2) *Report and Order* in General Docket No. 87-112, 53 Fed. Reg. 10022 (January 15, 1988) implementing spectrum efficiency in the National Plan for the public safety service allocation at 821-824/ 866-869 MHz, and 3) *Notice of Proposed Rule Making* in General Docket No. 87-390, 2 FCC Rcd 6244 (1987), proposing to permit

introduction of advanced spectrum efficient cellular systems in the new ten megahertz of spectrum allocated to the cellular service as well as preexisting cellular spectrum.

[7] We had previously considered an allocation for an air-to-ground service in the 800/900 MHz region. *See Notice of Proposed Rule Making* in General Docket No. 83-30, 48 Fed. Reg. 12253 (March 23, 1983); *Report and Order* in General Docket No. 83-30, 57 RR 2d 1219 (1985); *Memorandum Opinion and Order* in General Docket No. 83-30, FCC 86-336, released August 1, 1986; and *Memorandum Opinion and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, *supra*, at paras. 59-62. While we declined to make an allocation for an air-to-ground service at that time, we believe that circumstances have changed substantially.

A major reason the Commission rejected an allocation for air-to-ground service was that it appeared other services of higher priority would require all of the 800/900 MHz spectrum. We have since allocated spectrum to these services, including cellular radio, private radio, and the mobile-satellite service, and four megahertz of spectrum remains available. *See Allocation Order*.

Another reason the Commission expressed concern about the air-to-ground service was that it appeared only a narrow segment of the public would benefit from this service. However, considerable marketing information has been gained from an air-to-ground service operated by GTE Airfone, Inc. (Airfone) under an experimental license. This information indicates that the service is highly attractive to consumers. Over one million calls were placed on Airfone's system during 1987, even though only about 700 aircraft were equipped with public telephones at year's end. Given a permanent allocation for the service, Airfone anticipates dramatic growth as the service expands to include about ninety percent of the approximately 3,500 commercial United States aircraft. Also, Airfone has recently equipped a few aircraft with "seatphones" to make the service more convenient and reports a three-fold increase in the number of calls per aircraft. Airfone envisions that all aircraft could be equipped with telephones that can be used by passengers at their seats. *See* the Commission's file on Airfone's experimental license. This file is available for public inspection in the Office of Engineering and Technology, Frequency Liaison Branch, 2025 M Street, N.W., Washington, D.C., room 7322.

[8] *See The World Almanac and Book of Facts*, 1988 edition, p. 152.

[9] We recognize that there may be a few thinly-travelled air routes where it would not be economically viable to provide air-to-ground service.

[10] Comments are invited on whether separately licensed regional systems are viable. Commenters advocating regional systems should fully address the issues raised elsewhere in this proposal in the context of regional systems. Further, comments should indicate how regions should be defined, how frequency coordination between systems might be accomplished, and whether standards are needed to ensure compatibility of aircraft mobile units with base stations in different systems.

[11] Airfone performed an analysis that concluded four megahertz of spectrum is needed, taking into account several factors, including: average number of calls per 100 passengers, average length of calls, trends in air traffic and number of passengers per plane, the need to maintain busy hour blocking probability of two percent, etc. The analysis was also based on specific features of Airfone's system such as use of 6 kHz channel spacing, use of a particular frequency reuse pattern, and use of trunking at each ground station, among other features. We note, in particular, that in determining the required spectrum it is necessary to design for peak communications demands that shift with aircraft traffic patterns. *See Air-To-Ground Technology Report*, Section 4, in the Commission's file on Airfone's experimental license.

[12] Special technical constraints are involved in establishing this service due to the propagation characteristics of transmissions to and from aircraft, as well as a variety of other factors. For example, signal propagation is dependent upon the altitude of the aircraft. Signals transmitted from an aircraft at 40,000 feet propagate for several hundred miles; signals transmitted from an aircraft flying at lower altitudes such as 10,000 feet propagate much shorter distances. This requires careful planning of ground station locations and reuse of frequencies to obtain the desired coverage, to make efficient use of the spectrum, and to avoid interference.

[13] We anticipate that air-to-ground systems will employ trunking technology similar to Airfone's experimental service. Airfone's experimental system design calls for trunking 83 voice channels at a peak ground station. Two trunked systems of 41 and 42 channels, respectively, would be capable of handling about ten percent less communications traffic at a two percent blocking rate.

[14] *See Report and Order* in CC Docket 79-318, 86 FCC 2d 469 (1981).

[15] We recognize that we have not proposed whether the airline company or the air-to-ground licensee should own the radiotelephone equipment aboard the aircraft, nor have we proposed whether this equipment should be compatible with both ground systems. We tentatively believe that these decisions can best be made by the airline companies and the air-to-ground licensees, but request comment on these and related matters.

[16] *Cf., Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service*, CC Docket No. 86-179, 2 FCC Rcd 425 (1987) adopting a procedure to allow Multipoint Distribution Service licensees to be regulated as non-common carriers (private) or non-dominant common carriers). *See also Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982) *aff' d, World Communications, Inc. v. FCC*, 735 F. 2d 1465 [D.C. Cir.], (1984) allowing certain satellite transponders to be regulated as non-common carriers.

[17] *See NARUC v. FCC*, 525 F. 2d. 630, 641-644, [D.C. Cir.], *cert. denied*, 425 U.S. 992 (*NARUC I*) (1976).

[18] For the land mobile services, this test of private carriage under *NARUC I* has been superseded by Section 331 of the Communications Actof 1934, as amended, 47 U.S.C. Section 332. That section preempts state entry and rate regulations of private land services and establishes a test for determining whether a land mobile service is a common carrier service: a land mobile service that resells telephone exchange or interexchange service is a common carrier service. 47 U.S.C. Section 332(c). We request comment on whether the air-to-ground service could be treated as a land mobile service, especially if ancillary services can be provided.

[19] Although it is not directly applicable, the *Federal Aviation Act of 1958*, as amended (*Air Act*), offers guidance on preemption of state regulation of services provided by air carriers. Specifically, Section 1305, 49 U.S.C. Section 1305 preempts states from enacting or enforcing any "law, rule, regulation, standard . . . relating to . . . services of any air carrier . . ." As the air-to-ground PSTN interconnection service is an ancillary service being made available through air carriers, we believe the intent of the *Air Act* would apply. We request comment on the practicality of determining the jurisdictional nature of calls on flights between points in the same state.

[20] *See Louisiana Pub. Service Comm' n v. FCC*, 106 S.Ct. 1890, 1902 n. 4.

[21] *See Memorandum Opinion and Order on Reconsideration*, General Docket No. 80-183, 93 FCC 2d 908, 919-22 (1983), *aff'd.* ; *Third Report and Order*, General Docket No. 80-183, 97 FCC 2d 900, 908-9 (1984).

[22] While we believe that the preemptive approach discussed above may best suit the particular characteristics of the air-to-ground service, we note that in the *Mobile Satellite Order*, we took a different approach (*See Second Report and Order* in General Docket No. 84-1234, 2 FCC Rcd 485, 490-91, paras. 40-41, in the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services). In that *Order* we preempted state regulation over technical standards and rate and entry regulation of the space segment of the mobile-satellite service (MSS). We found that permitting states to impose their individual regulatory schemes over the space station licensee of MSS would jeopardize the operation of the system because of the virtual impossibility of implementing space stations that adhere to fifty potentially conflicting technical standards, entry standards, and space segment rate standards (*Id.* at 491, para. 40). However, with respect to the ground segment of MSS, *i. e.*, the gateway station and end user licensees or resellers that provide service to end users, we declined to preempt state regulation of any intrastate common carrier services within the meaning of Section 2(b) of the Communications Act (47 U.S.C. Section 152(b). We recognized that preemption could be proper for some ground segment applications of MSS, but we found it premature to reach any definitive conclusions until MSS is implemented and a specific service is before us for review (*Id.* at 491, para. 41). While we request comment on whether the preemptive approach of the *Mobile Satellite Order* has any application to the air-to-ground service discussed herein, we tentatively conclude that a broader preemption is necessary, as discussed above. Our authority for regulation of charges and services of interstate common carriers is contained in Title II of the Communications Act of 1934, as amended. Sections 201-205 of the Act provide the basic statutory standards by which we judge the lawfulness of carriers' rates and service regulations.

[23] MSS is expected to offer a host of services when it becomes operational in the early 1990s.

[24] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (Competitive Carrier Rule Making), *Notice of Inquiry and Proposed Rule Making*, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d 1 (1980); *Further Notice of Proposed Rule Making*, 84 FCC 2d 445 (1981); *Second Report and Order*, 91 FCC 2d 59 (1982) *recon.*, 93 FCC 2d 54 (1983); *Second Further Notice of Proposed Rule Making*, FCC No. 82-187, 47 Fed. Reg. 17,308 (April 22, 1982); *Third Notice of Proposed Rule Making*, 48 Fed. Reg. 28,292 (June 21, 1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (October 14, 1983); Fourth *Report and Order*, 95 FCC 2d 554 (1983); Fourth *Further Notice of Proposed Rulemaking*, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth *Report and Order*, FCC 84-566, 57 RR 2d 1391 (1985); *765 F. 2d 1186 (D.C. Cir. vacated 1985)*.

[25] We note that Airfone's experimental air-to-ground system features substantial frequency reuse and operates with six kilohertz channels via the use of compatible single sideband modulation for all voice and data communications.

[26] *See Notice of Proposed Rule Making*, General Docket No. 84-1234, 50 Fed. Reg. 8149 (February 28, 1985); Public Notice Report No. DS-415, accepting for filing twelve mobile satellite applications, released June 13, 1985; *Report and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, *supra*, at paras. 120-156; *Second Report and Order* in General Docket No. 84-1234, *supra; Memorandum Opinion and Order* in General Docket Nos. 84-1231, 84-1233, and 84-1234, *supra*, at paras. 23-58.

[27] Airfone's system had originally used the 899-901 MHz band as its air-to-ground link, and the 944-946 MHz band as its ground-to-air link. However, GTE Airfone applied for a modification to its experimental license to relocate its system to 849-851 MHz for the ground-to-air link, and 894-896 MHz for the air-to-ground link. This relocation was requested to avoid causing interference to new private land mobile systems soon to be operating in the 899-901 MHz band and to avoid receiving interference from expanding broadcast auxiliary operations in the 944-946 MHz band.

The application was granted and we understand that Airfone has begun the transition from old to the new frequency bands. The old frequencies are expected to be vacated by Airfone by August 1989. Airfone was advised that grant of the application for the new frequencies will not influence the outcome of the Commission's planned rule making on the four megahertz nor will it necessarily confer preferred status on Airfone. Airfone was further advised that even if the four megahertz is allocated for air-to-ground services, it cannot be assumed that GTE Airfone would be chosen to provide such services, alone or in conjunction with other providers. Airfone's conversion to the new frequencies is being done at its own risk.

[28] *See* footnote US268 to the Table of Frequency Allocations in Section 2.106 of the Commission's Rules.

[29] *See Notice of Proposed Rule Making*, General Docket No. 87-390, *supra*.

[30] To the extent commenters propose or oppose a dispositive preference for a particular entity, such comments should be reflected only in the written comments in this proceeding. No oral *ex parte* presentations concerning this issue will be permitted. Any written comments submitted outside the normal comment cycle that concern this issue should be served on all commenters.

[31] *See Second Report and Order* in General Docket No. 84-1234, supra, at para. 24. In this proceeding the Commission required mobile-satellite applicants to place5 million in escrow.

[32] *See*, however, n. 30, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Section 1.743 of the
Commission's Rules and Regulations

ORDER

Adopted: April 7, 1988; Released: April 27, 1988

By the Commission:

1. The common carrier, broadcast, and private radio services are each governed by specific Commission Rules which explain who may sign applications seeking FCC authorization in those services. The relevant rule sections are Section 1.743 for common carrier, Section 73.3513 for broadcast, and Section 1.913 for private radio. The language of the above rule sections (henceforth, the signature rules) is nearly identical except for the language of subsection (b) of each rule. Subsections (b) are similar in that they allow an attorney to sign an application, or amendment thereto, for an applicant if the applicant is physically disabled. The subsections differ in that an attorney for a broadcast or private radio applicant may sign an application for his client if the applicant is absent from the United States, whereas the attorney for a common carrier applicant may sign for the applicant only if the applicant does not reside in the contiguous 48 States of the United States or the District of Columbia. *Compare* Section 73.3513(b) (broadcast) and Section 1.913(b) (private radio) with Section 1.743(b) (common carrier).

2. We do not perceive any reason for the foregoing inconsistency in our Rules. Moreover, this inconsistency in the signature rules has apparently confused some common carrier applicants, who have allowed their attorneys to sign their applications, or amendments thereto, for them when they were absent from the United States. Such an action is clearly authorized in the broadcast and private radio services, but is not allowed in the common carrier services. The confusion generated by the current inconsistency in the signature rules has resulted in litigation and has generally delayed the provision of service to the public. In view of these considerations, we have decided to revise Section 1.743(b) of the Rules to provide that attorneys may sign applications, amendments thereto and related statements of fact for common carrier applicants when those applicants are absent from the United States. This revision will bring Section 1.743(b) of the Rules, which governs the signing of common carrier applications, into conformity with Sections 73.3513(b) and 1.913(b) of the Rules, which govern the signing of broadcast and private radio applications, respectively. We believe these rules are consistent with Section 308(b) of the Communications Act of 1934, as amended. In addition, this revision will avoid the delays encountered over signature problems under the current version of Section 1.743(b) and thus further the Commission's goal of providing service to the public in the most efficient, expeditious manner possible.

3. Authority for this revision of our Rules and Regulations is contained in Sections 4(i) and (j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and (j) and 303(r). Because this revision relates to a matter of procedure, the provisions of 5 U.S.C. Section 553 are not applicable.

4. ACCORDINGLY, IT IS ORDERED, that on the date that this Order is published in the Federal Register, Section 1.743(b) of the Commission's Rules and Regulations IS REVISED as set forth in the Appendix below.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations, is amended to read as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303.

2. Section 1.743 is amended by revising paragraph (b) to read as follows:

Section 1.743 Who may sign applications.

* * * * *

(b) Applications, amendments thereto, and related statements of fact required by the Commission may be signed by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall in that event separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-121

In the Matter of

Amendment of Part 73 of the Commission's Rules to permit short-spaced FM station assignments by using Directional Antennas — RM-6015

ERRATUM

Released: April 27, 1988

On March 30, 1988, the Commission released a Notice of Proposed Rule Making (FCC 88-73) in the captioned proceeding. This document corrects footnote 14 to read as follows:

[14] In other contexts we have raised the issue of whether the licensee may decide to rceive interference. *AM Technical Criteria* in MM Docket No. 87-267, FCC 87-245, 52 FR 31795, para. 46-58 (August 24, 1987).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-420

In re Application of

TOM-TOM COMMUNICATIONS, INC. File No. BPH-850712SW

For Construction Permit for New TV Station, Rapid City, South Dakota

NOTICE

Released: March 24, 1988

Administrative Law Judge Walter C. Miller's Summary Decision in this proceeding (FCC 88D-2) was released February 3, 1988. No exceptions have been filed, and the Commission has not ordered a review of the Summary Decision on its own motion. Fifty days have passed since public release of the Summary Decision. Pursuant to Section 1.276 of the Commission's Rules, the Summary Decision became effective March 24, 1988, without action by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-496

In re Applications of

JOHN JONES, JR. File No. BPCT-861105KM

CARL M. FISHER File No BPCT-870121KL

For Construction Permit for a
New Television Station
Minden, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: April 8, 1988; Released: April 25, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Review Board has under consideration a misstyled "Application for Review" directed to the Board,[1] filed February 23, 1988 by John Jones, Jr.,[2] essentially seeking to appeal the ruling of presiding Administrative Law Judge Miller (ALJ) dismissing both captioned applications for a construction permit for a new television station (Channel 21) at Minden, Louisiana, and terminating the proceeding, *Memorandum Opinion and Order*, FCC 88M-169, released January 25, 1988 (hereinafter *"Dismissal Order)*. The Chief, Mass Media Bureau, has filed an opposition to the appeal, and Jones has filed a reply. In the *Dismissal Order*, the ALJ found that neither applicant filed a notice of appearance nor paid the6,000 hearing fee, both of which were due on January 14, 1988, and therefore dismissed the applications for failure to prosecute.[3]

2. In its appeal, Jones claims that a notice of appearance was in fact filed on December 30, 1987, and a settlement agreement was filed contemporaneously. In a "Statement for the Record" attached to his appeal, Jones repeats his claim that his notice of appearance was filed on December 30, 1987, and adds, *inter alia*, that a joint settlement request was filed on January 9, 1988. Appeal Exh. 1. A copy of the notice of appearance, signed by Jones on December 30 and certified by him that it was mailed on January 4, 1988, also is attached. Appeal Exh. 2.

3. In its opposition, the Mass Media Bureau states: (1) the notice of appearance and joint settlement request were due by January 14, 1988; (2) a thorough and diligent search of the files of the Commission's Dockets Branch revealed that Jones filed a notice of appearance on January 20, 1988;[4] (3) the joint settlement request, which the Mass Media Bureau states "was deficient and, therefore, ungrantable,"[5] was filed on January 15, 1988;[6] (4) Jones has not offered a showing of "good cause" for its tardiness in filing its notice of appearance and, therefore, dismissal of Jones' application was authorized by rule Section 1.221; and (5) because Jones did not timely file the joint settlement papers by the date the notice of appearance was due, he was required by 47 CFR §1.221 to pay the 6,000 hearing fee, and his failure to do so warranted dismissal of his application.

4. In reply, Jones submits his declaration and that of his secretary to the effect that his notice of appearance was mailed on December 31, 1987.[7] However, he has not produced any rebuttal exhibits showing the existence of a timely-stamped copy of his notice of appearance or joint settlement request; instead, he simply speculates that either "the United States Postal Service . . . delivered the materials untimely" or "possibly someone at the Commission might be in error." *See* Jones Reply at 2.

5. We shall dismiss Jones' appeal. In order to preserve his right to appeal an ALJ's ruling terminating a hearing proceeding, a party must file a notice of appeal within 10 days after the ruling is released. *See* 47 CFR §1.302(b); *St. Croix Wireless*, *supra* note 1, at para. 3. Jones did not file a notice of appeal and therefore failed to preserve his appeal right. Moreover, it is undisputed that by January 14, 1988, the due date for filing a notice of appearance in this proceeding, the Commission had not received a notice of appearance, joint settlement request, or any request for an extension of the filing period. Section 1.221(c) of the Rules clearly provides:

> Where an applicant fails to file such a written appearance within the time specified, or has not filed prior to the expiration of that time . . . a petition to accept, for good cause shown, such written appearance beyond expiration of [the specified filing period], the application will be dismissed with prejudice for failure to prosecute.

47 CFR §1.221(c). Accordingly, the ALJ's dismissal of Jones' application was proper. *Cf. Turquesa Enterprises*, FCC 88R-12, released March 7, 1988. In addition, a6,000 hearing fee is required to be submitted with the notice of appearance, unless a settlement agreement has been filed and the notice of appearance so indicates. *See id.* (*citing* 47 CFR §1.221(f), (g), and Note). Here, Jones' settlement agreement, as well as his notice of appearance, was late filed; therefore, payment of the hearing fee would also have been required of him.

6. ACCORDINGLY, IT IS ORDERED, That the "Application for Review" filed on February 23, 1988 by John Jones, Jr. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Commission itself retains jurisdiction over Applications for Review filed pursuant to 47 CFR §1.115. However, the instant pleading is in substance an appeal from a presiding officer's final ruling over which, pursuant to 47 CFR §1.302, the Board has

delegated authority. *Cf. St. Croix Wireless Co.*, FCC 88R-13, released March 2, 1988, *Erratum*, DA 88-309, released March 14, 1988.

[2] The pleading was filed under the name Big Bayou Communications, Inc. However, a petition for leave to amend, filed by Jones on January 20, 1988 and purporting to change the name of the applicant to Big Bayou, was dismissed by the ALJ. *Memorandum Opinion and Order*, FCC 88M-170, released January 25, 1988. In any event, we shall continue to refer to the applicant as John Jones, Jr., for the sake of clarity.

[3] The ALJ also noted that neither applicant submitted "ownership integration" statements or "diversification" updates, which were due on January 13, 1988. However, the ALJ specifically held "not fatal" these failures to supply information relevant only to the standard comparative issue. *Dismissal Order*, at n.1.

[4] Neither the ALJ nor the Mass Media Bureau's Hearing Branch ever received a copy of the notice of appearance; only the original was found in the Dockets Branch. Also, the notice of appearance bears the "Received" stamp of the Commission's "Office of the Secretary" rather than the "Received By" stamp of the Commission's "Mail Branch," thus indicating that the notice of appearance was filed in person in the Secretary's Office on January 20, 1988. *See* Mass Media Bureau Opposition, Att. A (copy of notice of appearance).

[5] The joint settlement request was not subscribed and verified, as required by 47 CFR §1.52, and was not accompanied by affidavits of the applicants setting forth why the agreement serves the public interest and stating that the applications were not filed for the purpose of reaching or carrying out such agreement, as required by 47 CFR §73.3525(a). *See* FCC 88M-170, *supra* note 2, at n.1.

[6] *See* Mass Media Bureau Opposition at 4, and Att. B (copies of transmittal letter and front page of joint request, both bearing the "Received" stamp of the "Office of the Secretary").

[7] Jones also states that all of his documents were mailed to the Commission and none were hand carried. *See* Jones Reply, Declaration of Jones.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-56

In the Matter of

Designation of a Standard
Computer Algorithm for Propagation
Prediction in the FM and TV
Broadcast Services.

ORDER

Adopted: April 15, 1988; Released: April 19, 1988

By the Chief, Mass Media Bureau:

1. On February 24, 1988, the Commission released a *Notice of Proposed Rule Making* (*Notice)* in the captioned matter.[1] Comment and reply due dates were set for April 18, 1988 and May 3, 1988, respectively. On April 7, 1988, the Association of Federal Communications Consulting Engineers (AFCCE) filed a motion requesting that the time for filing comments in this proceeding be extended 90 days. On April 8, 1988, the firm of Hammett & Edison, Inc. (H&E) filed a similar request, but for a 60 day extension.

2. As justification for its request, AFCCE states that it needs additional time to determine whether the proposed algorithm accurately replicates the propagation curves in the Commission's rules.[2] Also, AFCCE desires additional time to study various aspects of the computer programs that the Commission's staff uses to implement the proposed algorithm. AFCCE complains that it has not yet been able to procure a copy of a Commission program from the National Technical Information Service (NTIS) and that efforts to obtain a copy of the program from the Commission's staff on an informal basis have been rebuffed. [3] Finally, AFCCE requests additional time because it wishes to consider the matters raised in the *Notice* at its annual meeting in early May 1988, prior to filing its comments in the proceeding.

3. H&E also bases its request for additional time on a desire to evaluate the computer programs that the Commission's staff uses. H&E has obtained a copy of the paper describing the proposed algorithm, but considers it impractical to keystroke the interpolation subroutine program code it contains. Therefore, it (like AFCCE) has attempted to procure a magnetic tape copy of the Commission's program from NTIS, but has not yet obtained it. Consequently, H&E requests a two month extension of the comment period.

4. We are not extending the comment period as requested by the petitioners. The comprehensive information contained in the paper referenced by the proposed rule[4] is sufficient to permit interested persons to study the theory and methods of the proposed algorithm, and to write computer programs that implement it. The relatively complex computer programs we employ to implement the algorithm would contribute very little to the information contained in the algorithm paper. Thus, although our implementation of the algorithm may be a matter of academic interest, extending the comment period simply to provide for more extensive study of our computer programs fails to meet the good cause standard necessary to warrant granting an extension of time.

5. Furthermore, we decline to extend the comment deadlines until after the upcoming AFCCE annual meeting. In consideration of our ongoing workload, we are reluctant to delay our rule making proceedings solely to accommodate the private schedules of interested parties. Only when it is conclusively demonstrated that such delay could be expected to produce substantial benefits to the public process, such as the results of vital and relevant research, or a compromise agreement between opposing parties, would we be willing to grant an extension for this reason.

6. Accordingly, IT IS ORDERED that the petitions filed by AFCCE and H&E to extend the comment period in this proceeding ARE DENIED.

7. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] *See* FCC 88-41, released February 24, 1988, 3 FCC Rcd 843-847 (1988). A summary of the *Notice* was published in the Federal Register (53 Fed. Reg. 6677, March 2, 1988).

[2] As stated in the *Notice*, the algorithm was used to draw the metric propagation curves currently contained in the rules. *See* discussion at paragraph 10, FCC 88-41, released February 24, 1988.

[3] Pursuant to Section 0.465(d)(3) of the Commission's rules, copies of many Commission computer programs are available through the NTIS.

[4] Proposed new rule §73.4240 *Field strength computer algorithm* references the paper entitled "Algorithm for Computing Field Strength for FM and TV Broadcast Stations". This paper is readily available from our copy contractor, International Transcription Services, Inc., 2100 "M" Street, N.W. Suite 140, Washington, DC 20037, (202) 857-3800.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-37

In the Matter of

Amendment of Parts 13 and 80 of the Rules concerning ship radio officer qualifying service endorsements.

ORDER EXTENDING REPLY COMMENT PERIOD

Adopted: April 19, 1988; Released: April 27, 1988

By: Chief, Private Radio Bureau

1. The American Radio Association, MM&P, AFL-CIO (ARA) and the Radio Officers Union, District 3 of the National Marine Engineers Beneficial Association, AFL-CIO (ROU), have requested that the Commission extend the time within which to file Reply Comments in the General Docket captioned above from April 25, 1988 to May 6, 1988.

2. The ARA/ROU have shown good cause in support of their request. ARA/ROU state that they are participating in the 55th Session of the Maritime Safety Committee of the International Maritime Organization from April 11-22, 1988, in London, England. They argue that the current reply period does not allow sufficient time after their return from England for review of the record and preparation of reply comments.

3. IT IS THEREFORE ORDERED that the time within which to file comments in the proceeding captioned above IS EXTENDED through **May 6, 1988.** Authority for this action is contained in Sections 1.46 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 1.46 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-183

In re Applications of

WOODS COMMUNICATIONS GROUP, INC.	File No. BPCT-870904KJ
WILLIAM L. COOK, II	File No. BPCT-871021KE
LOVE TELEVISION PARTNERSHIP	File No. BPCT-871106KF
COLUMBIA TV AND RADIO, INC.	File No. BPCT-871109KE
PEARS BROADCASTING, INC.	File No. BPCT-871109KF
JIMMIE V. GILES	File No. BPCT-871110KE
CALDWELL BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-871110KH
RICHARD WILLIAM WAINWRIGHT	File No. BPCT-871110KK
KTVE, INC.	File No. BPCT-871110KL
LANFORD TELECASTING CO., INC.	File No. BPCT-871110KM

For Construction Permit
Columbia, Louisiana

HEARING DESIGNATION ORDER

Adopted: April 14, 1988; Released: April 27, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 11, Columbia, Louisiana; petitions for leave to amend and accompanying amendments filed by William L. Cook, II, Caldwell Broadcasting Limited Partnership (Caldwell) and Lanford Telecasting Co., Inc. (Lanford);[1] petitions to deny the applications of Richard Wainwright and Lanford, filed by Love Television Partnership;[2] and related pleadings.

2. No determination has been reached that the tower height and location proposed by each applicant, except Woods Communications Group, Inc., (Woods), Love Television Partnership (Love TV), Caldwell and Lanford, would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

3. If Lanford is the successful applicant in this proceeding, it proposes to operate the Columbia station as a satellite of Station KALB-TV, Alexandria, Louisiana. All of the other applicants propose full service operations. Accordingly, an issue will be specified to determine if circumstances exist which would make a satellite operation necessary for Columbia.

4. The transmitter sites proposed by Woods and Richard Wainwright (Wainwright) do not comply with Section 73.610 of the Commission's Rules (minimum separation requirements). Section 73.610 requires a minimum separation of 304.9 km. Although Woods indicates that its proposed site is not short-spaced, our engineering analysis discloses that the site proposed by Woods is 304.8 km from the vacant allocation for Channel 11, Houma, Louisiana. Therefore, Woods' site is .1 km short-spaced. The site proposed by Wainwright is 304.2 km from the same reference point. Therefore, Wainwright's site is .7 km short-spaced and he has requested a waiver of the rule. Accordingly, an issue will be specified to determine whether circumstances exist which would warrant a waiver of Section 73.610. Since an applicant proposing a short-spaced site is required to make a threshold showing that no suitable fully-spaced site is available, the Administrative Law Judge will, in assessing those circumstances, consider the fact that each of the other applicants in this proceeding has specified a fully-spaced site.

5. The Commission requires all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter sites will be available to them. Woods and Pears Broadcasting, Inc. (Pears Broadcasting) have not submitted such a certification. Accordingly, Woods and Pears Broadcasting will each be given 30 days from the release date of this Order to file such a certification, in the form required by the Commission, with the presiding Administrative Law Judge. If either applicant cannot make the certification, it shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

6. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. Jimmie V. Giles has not submitted such an exhibit. Accordingly, Giles will be required to file the appropriate exhibit with the presiding Administrative Law Judge within 30 days after this Order is released.

7. Section II, item 4(a), FCC Form 301, requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Woods, Love TV and Caldwell have not completed item 4(a) correctly. The Woods application gives a Post Office Box number as the residence address of Charles Woods and Chris Bence. The Love application specifies the city and state where each of the partners resides, but does not give a home address for each. Finally, the Caldwell application gives a Post Office Box number as the address of its sole general partner. Accordingly, Woods, Love TV and Caldwell must each submit an amendment which gives all

the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

8. Section 73.3555 of the Commission's Rules provides that no license for a television broadcast station shall be granted to any party if such party directly or indirectly owns, operates or controls:

> 1) one or more television broadcast stations and grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations (Section 73.3555(a)); or
>
> 2) an AM or FM broadcast station and grant of such license will result in the Grade A contour of the television station encompassing the entire community of the AM or FM station (Section 73.3555(b)).

9. Woods is the licensee of Station KARD-TV, West Monroe, Louisiana. The Grade B contours of the existing and proposed stations overlap. Therefore, a grant of the instant application would violate Section 73.3555(a). However, Woods has represented to the Commission that, if it is the successful applicant in this proceeding, it will divest itself of all interest in, and connection with, Station KARD-TV. Accordingly, any grant of a construction permit to Woods will be appropriately conditioned.

10. KTVE, Inc. (KTVE) is the licensee of Station KTVE-TV, El Dorado, Arkansas. The Grade B contour of KTVE-TV overlaps the Grade B contour of the station proposed in the instant application. Consequently, a grant of the Columbia application would violate Section 73.3555(a). However, KTVE has stated that it would divest itself of all interest in, and connection with, Station KTVE-TV, if it is granted a construction permit in this proceeding. Accordingly, any grant of a construction permit to KTVE will be appropriately conditioned.

11. Additionally, Gray Communications Systems, Inc. (Gray) owns 100 percent of the stock of KTVE. Sandler Associates (Sandler) owns 9.79 percent of Gray. In an amendment to its application, KTVE states that Sandler and/or its principals may, in addition to the ones already disclosed, hold other media interests. KTVE stated that Sandler had been requested to furnish KTVE with the information, which it would then send to the Commission. No amendment has been received. Accordingly, KTVE will be directed to submit an amendment containing a complete disclosure of the media interests of the officers, directors and attributable stockholders of Sandler to the presiding Administrative Law Judge within 30 days after this Order is released.

12. Thomas G. Pears, President, Treasurer and 80 percent owner of Pears Broadcasting, is also the Vice President, Director and General Manager of Texoma Broadcasters Co., licensee of Station KLFY-TV, Lafayette, Louisiana. The Grade B contours of KLFY-TV and the proposed facility overlap. Furthermore, Tom D. Gay, Secretary, Director and 20 percent owner of Pears Broadcasting, is the sole owner and General Manager of Stations KCTO(AM) and KCTO-FM, Columbia, Louisiana; Stations KFNV(AM) and KFNV-FM, Ferriday, Louisiana; and Stations KCKW(AM) and KJNA(FM), Jena, Louisiana. The Grade A contour of the proposed station encompasses the entire communities of the existing stations. Therefore, a grant of Pears Broadcasting's application would violate Section 73.3555(b). However, Pears Broadcasting has represented that if it is the successful applicant in this proceeding, Thomas Pears will divest himself of all interest in, and connection with, the licensee of Station KLFY-TV. Similarly, Tom Gay will divest himself of all interest in, and connection with, Stations KCTO(AM), KCTO-FM, KFNV(AM), KFNV-FM, KCKW(AM) and KJNA(FM). Therefore, any grant of a construction permit to Pears Broadcasting will be appropriately conditioned.

13. Love Broadcasting Company, the 52 percent owner of Love TV, owns 80.6 percent of TAB Broadcasting Company, Inc. which is the 100 percent owner of Live Oak Broadcasting, Inc., licensee of Station KNAN(FM), Monroe, Louisiana. Monroe is within the Grade A contour of the proposed station. Therefore, a grant of the instant application would violate Section 73.3555(b) of the rules. However, Love TV has represented that, if it is awarded a construction permit for Columbia, Love Broadcasting Company would divest itself of all interest in, and connection with, the licensee of Station KNAN(FM). Accordingly, if Love TV is granted a construction permit in this proceeding, the construction permit will be appropriately conditioned.

14. Further, Randall E. Reynolds is a General Partner and 5 percent owner of Love TV. Mr. Reynolds is also employed as General Manager of KNAN(FM). His employment may be inconsistent with our cross-interest policy. However, Love TV has represented to the Commission that Mr. Reynolds would sever all connections with KNAN(FM), if Love TV is the successful applicant in this proceeding. Accordingly, the construction permit will be appropriately conditioned.

15. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine, with respect to each applicant, except Woods Communications Inc., Love Television Partnership, Caldwell Broadcasting Limited Partnership and Lanford Telecasting Co. Inc., whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2. To determine, with respect to Lanford Telecasting Co. Inc., whether circumstances exist which would make a satellite operation necessary for Columbia, Louisiana.
>
> 3. To determine, with respect to Woods Communications Group, Inc. and Richard William Wainwright, whether circumstances exist which would warrant a waiver of Section 73.610 of the Commission's Rules.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by William L. Cook, II, Caldwell Broadcasting Limited Partnership and Lanford Telecasting Co., Inc. ARE GRANTED and the accompanying amendments ARE ACCEPTED.

19. IT IS FURTHER ORDERED, That the petitions to deny filed by Love Television Partnership ARE DISMISSED.

20. IT IS FURTHER ORDERED, That Woods Communications Group, Inc. and Pears Broadcasting, Inc. shall each file a site availability certification, in the form required by the Commission, with the presiding Administrative Law Judge, or advise the Administrative Law Judge that certification cannot be made, as may be appropriate, within 30 days after this Order is released.

21. IT IS FURTHER ORDERED, That Jimmie V. Giles shall submit an amendment which contains his response to Section IV, FCC Form 301 (program service statement), to the presiding Administrative Law Judge within 30 days after this Order is released.

22. IT IS FURTHER ORDERED, That Woods Communications Group, Inc., Love Television Partnership and Caldwell Broadcasting Limited Partnership shall each submit an amendment which contains the information required by Section II, item 4(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

23. IT IS FURTHER ORDERED, That in that event that Woods Communications Group, Inc. is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that it has divested itself of all interest in, and connection with, Station KARD-TV, West Monroe, Louisiana.

24. IT IS FURTHER ORDERED, That, in the event that KTVE, Inc. is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that it has divested itself of all interest in, and connection with, Station KTVE-TV, El Dorado, Arkansas.

25. IT IS FURTHER ORDERED, That, in the event that Pears Broadcasting, Inc. is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that:
>
> (a) Thomas G. Pears has divested himself of all interest in, and connection with, the licensee of Station KLFY-TV, Lafayette, Louisiana; and
>
> (b) Tom D. Gay has divested himself of all interest in, and connection with Stations:
>
> (1) KCTO(AM) and KCTO-FM, Columbia, LA
>
> (2) KFNV(AM) and KFNV-FM, Ferriday, LA
>
> (3) KCKW(AM) and KJNA(FM), Jena, LA

26. IT IS FURTHER ORDERED, That, in the event that Love Television Partnership is the successful applicant in this proceeding, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that:
>
> (a) Love Broadcasting Company has divested itself of all interest in, and connection with the licensee of Station KNAN(FM), Monroe, Louisiana; and
>
> (b) Mr. Randall E. Reynolds has severed all connection with Station KNAN(FM).

27. IT IS FURTHER ORDERED, That KTVE, Inc. shall submit an amendment which contains the information required by paragraph 11, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

28. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

29. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Service Division
Mass Media Bureau

FOOTNOTES

[1] On February 1, 1988, Cook filed a petition for leave to amend and an accompanying amendment. The amendment shows that Cook has met the requirements of Section 73.3580 (public notice). On March 22 and 29, 1988, Lanford and Caldwell, respectively, filed a petition for leave to amend and an accompanying amendment. The amendments show that the Federal Aviation Administration has issued determinations of no hazard regarding the Caldwell and Lanford proposals. The amendments have each been reviewed and good cause exists for accepting them. Therefore, the petitions will be granted and the amendments will be accepted.

[2] The petitions are, in essence, pre-designation petitions to specify issues. Since such petitions are no longer permitted, the petitions will be dismissed. *Revised Procedures for* Processing of Contested Broadcasting Applications, 72 FCC 2d 202 (1979).

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 12

Adopted: April 11, 1988 **Released: April 11, 1988**

Responsible Accounting Officers

Re: Attestation Audits pursuant to the Joint Cost Order and Joint Cost Reconsideration Order (CC Docket 86-111)

In prescribing rules for the separation of costs of regulated telephone services from costs of nonregulated activities, the Federal Communications Commission concluded that independent audits would be an important aid in implementing its commitment to monitor compliance with cost allocation requirements. The Commission further concluded that an appropriate level of assurance would be an examination leading to a positive opinion. Accordingly, the Commission required that each operating company have an independent audit performed annually and that a positive opinion audit report be submitted each year attesting to the accuracy of the carriers' cost allocations as reported to the Commission. In the process of complying with these requirements, questions have been raised regarding the Commission reports to which the auditors' attestation reports will apply, how and when they should be filed, and what the attestation covers. In this RAO letter we are responding to these questions.

The auditors' reports should accompany the Report of Annual Revenue Requirement and Joint Cost Data, identified as Appendix C of the *ARMIS Order* (CC Docket 86-182, 2 FCC Rcd 5770 (1987)), aggregated to the operating company level; and attest to the accuracy of cost allocations reported therein, including the effects of transactions with affiliates. Both the auditors' reports and the Report of Annual Revenue Requirement and Joint Cost Data are to be filed April 1 of each year.

In order to facilitate the submission of the attestations by the independent auditors, we have prepared a sample attestation letter designed to provide the assurances the FCC is seeking. The sample letter is intended as a guide and will encompass the requirements of the *Joint Cost Order* and the *Joint Cost Reconsideration Order*. The attestation letters will undoubtedly vary according to the circumstances and independent auditors should not view themselves as bound by the literal format of the sample letter.

However, at a minimum the letter should:

1. Identify the operating company entity;

2. Stipulate that the report is prepared for the Federal Communications Commission;

3. Identify the period covered by the report;

4. Stipulate that the report was prepared pursuant to Federal Communications Commission rules for the assignment and allocation of costs between regulated and nonregulated activities and for accounting for transactions with affiliates, including the valuation of assets and services in those transactions;

5. State that the examination was made in accordance with standards established by the American Institute of Certified Public Accountants and included such tests of the underlying records and such other procedures as were considered necessary under the circumstances;

6. Identify the scope and the extent of examination, including any limitations imposed on the scope of the work or extent of the examination by the carrier, its affiliates, or any other circumstances (References should be made here to attached work plans);

7. Provide an opinion of whether or not the methodologies in place are in conformity with the cost allocation manual approved by the Federal Communications Commission, are consistent with the Commission's rules for the assignment and allocation of costs between regulated and nonregulated activities, and are consistent with the accounting for transactions with affiliates, including the valuation of assets and services in those transactions. The opinion should also state whether or not the reported results are an accurate application of those methodologies.

This Responsible Accounting Officer letter is issued under Section 0.291 of the Commission's rules. Applications for review under Section 1.115 of the Commission's rules must be filed within 30 days from the date indicated above (*See* Section 1.4 (b)(4) of the Commission's rules).

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

To: Secretary
Federal Communications Commission

We have examined the accompanying Report of Annual Revenue Requirement and Joint Cost Data for (*Carrier Name*) , which was prepared for the Federal Communications Commission. The accompanying Report for the period ended (*Date*) , was prepared pursuant to Federal Communications Commission rules for assignment and allocation of costs between regulated and nonregulated activities and for accounting for transactions with affiliates (47 CFR Sections 32.14, 32.23, and 32.27; and Section 64.901). Our examination was made in accordance with standards established by the American Institute of Certified Public Accountants and included such tests of the underlying records and such other procedures as we considered necessary under the circumstances. [Exceptions, if any]. These tests and procedures included . . . [statement of scope and the extent of examination and any limitations on either the scope or the extent of the examination][Reference should be made to attached work plans].

In our opinion, the methodologies in place are in conformity with the cost allocation manual approved by the Federal Communications Commission [Exceptions] and are consistent with the Commission's rules for the assignment and allocation of costs between regulated and nonregulated activities and for accounting for transactions with affiliates, including the valuation of assets and services in those transactions. The results contained in the accompanying report showing the separation of costs between regulated and nonregulated activities of *(Carrier Name)* are an accurate application of those methodologies.

Signature

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-88-082

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 20, 1988; Released April 29, 1988

By the Acting Chief, International Facilities Division:

1. We have before us for consideration an application, filed on February 23, 1988, by TRT International, Inc. (TRTI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on March 9, 1988. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. TRTI is a common carrier providing various international communications services. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by TRTI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-082 IS GRANTED and TRTI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S., on the one hand, and Canada and Mexico and those points listed in those tariffs on the other hand.

5. Copies of any operating agreements entered into between TRTI and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that TRTI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.R.F. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EASTERN TRANSCOMMUNICATIONS CORPORATION — File No. I-T-C-88-081

Application for authority to lease and operate facilities for service to Iraq

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 20, 1988; Released: April 29, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application, filed on February 25, 1988 and supplemented by letter of April 12, 1988, by Eastern Transcommunication Corporation (ETR), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to lease and operate satellite and connecting facilities. ETR, a Michigan corporation, is solely owned by Scott and Edward Elia, who are presently providing resale of switched voice service to overseas points pursuant to Commission authorization. The application was placed on public notice on March 9, 1988. No comments were received.

2. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of switched voice service to Iraq by ETR.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-88-081 IS GRANTED, and ETR is authorized to:

a. lease from Comsat and operate five voice-grade satellite circuits between an appropriate U.S. earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Iraq furnished by ETR's correspondent in Iraq;

b. lease and operate five voice-grade circuits in the appropriate U.S. earth station;

c. lease and operate five voice-grade circuits between ETR's Detroit operating office and the appropriate U.S. earth station; and

d. use said facilities to provide switched voice service between the U.S. and Iraq and beyond.

4. IT IS FURTHER ORDERED that ETR shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between ETR and its correspondent in Iraq, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

7. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

RADIOTELEPHONE
COMMUNICATORS OF
PUERTO RICO,
INC.,

Complainant,

v. File No. E-85-37

PUERTO RICO
COMMUNICATIONS
AUTHORITY,

Defendant.

MEMORANDUM OPINION AND ORDER

Adopted April 12, 1988; Released April 29, 1988

By the Chief, Common Carrier Bureau:

1. A Motion to Dismiss has been filed by the Puerto Rico Communications Authority (PRCA)[1] seeking dismissal of a complaint filed June 28, 1985, by Radiotelephone Communicators of Puerto Rico, Inc. (Radiotelephone).[2] The complaint alleged that PRCA engaged in certain anticompetitive conduct in violation of Sections 201(b) and 202 of the Communications Act (Act), 47 U.S.C. §§ 201(b), 202. In its motion, PRCA requests a ruling that this Commission lacks jurisdiction concerning the issues raised in Radiotelephone's complaint. In support of its motion, PRCA relies on a 1986 Supreme Court decision regarding the scope of the FCC's jurisdiction over intrastate common carrier ratemaking, *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) (*Louisiana*), and a subsequent circuit court decision in *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986) (*California*). Radiotelephone opposes the motion, arguing that the Commission does, in fact, have jurisdiction to hear a complaint alleging anticompetitive conduct. PRCA replies that the gravamen of Radiotelephone's complaint implicates intrastate ratemaking authority, which clearly is beyond the scope of the Commission's jurisdiction. For the reasons set forth below, we decline to assert jurisdiction in this proceeding.[3]

I. BACKGROUND

2. PRCA's application before the Commission for paging and mobile radio licenses, approved in December 1982, was vigorously contested by a number of radio common carriers (RCCs). In that proceeding, Radiotelephone alleged that granting a license for PRCA would give it an unfair competitive advantage and create the potential for anticompetitive predatory pricing because (1) its rates were unreviewable by the Public Service Commission,[4] (2) it did not pay income or excise taxes, and (3) it could finance its operations through cross-subsidization from its wireline operations and from low interest Rural Electrification Administration loans not available to Radiotelephone. The Commission rejected these anticipatory claims of anticompetitive behavior as "no more than speculation and surmise" and granted PRCA a license, stating that if "the petitioners [were] able to submit specific evidence that PRCA [had] engaged in anticompetitive conduct, this may be brought to the Commission's attention by way of a complaint."[5] In a petition for reconsideration, Radiotelephone repeated these allegations, which the Commission again rejected as speculation, recommending use of traditional antitrust remedies in the event the defendant engaged in anticompetitive conduct.[6]

3. Radiotelephone, in essence, repeats the allegations it raised in the licensing proceeding in the captioned formal complaint. It alleges that PRCA is engaged in anticompetitive conduct by charging unjust, unreasonable, and predatory rates for two-way mobile and one-way paging services in violation of Sections 201(b) and 202 of the Act. Radiotelephone does not take the position that the defendant is pricing its services below costs. Rather it alleges that PRCA was able to charge unreasonably low rates because its governmental agency status exempted it by law from the taxes and regulations imposed on Radiotelephone and other RCCs. Therefore, Radiotelephone argues, that PRCA's costs are artificially low when compared to those of its competitors who do not benefit from similar exemptions. For relief, Radiotelephone requests that the Commission institute a hearing into PRCA's alleged anticompetitive practices and issue an order directing PRCA to cease and desist from such conduct.

4. PRCA denies it acted unreasonably, discriminatorily, or anticompetitively in setting its public land mobile service rates charged to its customers. It asserts that while its rates may be different from those set out in its license application, they are cost-based, consistent with mainland rates, and legal under Puerto Rico law. PRCA also states that there has been no cross-subsidization from its wireline operations.[7] Further, it claims that Radiotelephone failed to state a cause of action under Section 202 of the Act because it made no allegations of price discrimination.

5. In its reply, Radiotelephone reiterates its position that PRCA's exemption from regulation and taxes is unfair and unreasonable and in violation of Section 201. It further claims that Section 202 is not limited to price discrimination and proscribes subjecting any person or locality to an unreasonable disadvantage.

II. CONTENTIONS OF THE PARTIES

6. In its Motion to Dismiss, PRCA contends that the Commission lacks jurisdiction over the issues raised in Radiotelephone's complaint. PRCA claims that under the U.S. Supreme Court's recent interpretation of Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), the Commission lacks jurisdiction over intrastate common carrier rates and that only Congress may confer this power. *Louisiana Public Service Corp. v. FCC*, 476 U.S. 355 (1986). PRCA also cites a subsequent decision by the U.S. Court of Appeals for the District of Columbia Circuit. According to PRCA, the circuit court held in that case that although Title III of the Act conferred upon the Commission jurisdiction over licensing of intrastate radio transmission, Title III licensing jurisdiction does not also encompass the ability to preempt state regulation of the common carrier

aspects of those radio transmissions. *California v. FCC*, 798 F.2d 515 (D.C. Cir. 1986). PRCA maintains that the concerns of Radiotelephone involve wholly intrastate common carrier communications and are essentially rate matters which the Commission, the D.C. Circuit Court, and the Supreme Court have held to be a state, rather than a federal, concern.[8] If the Commission exercised jurisdiction over the matter before us, PRCA states, it would be called upon to decide whether intrastate common carrier rates are lawful. Accordingly, PRCA urges that the Commission refrain from asserting jurisdiction as Radiotelephone is demanding.

7. Radiotelephone opposes the motion, claiming that PRCA mischaracterized its complaint as a ratesetting case, that the complaint actually alleges anticompetitive conduct by PRCA, and that the cases cited by PRCA are inapposite. Radiotelephone claims that the Commission does have jurisdiction to consider anticompetitive activities when exercising Title III licensing authority. PRCA's reply noted that the original complaint alleged violations of Sections 201(b) and 202, saying nothing about Title III, and reiterated its arguments against the Commission asserting jurisdiction.

III. DISCUSSION

8. The primary issue presented by PRCA's motion to dismiss is whether the FCC should assert jurisdiction in a situation where there is an allegation of anticompetitive intrastate rates. It should be noted that Radiotelephone has not set forth any facts to show either that PRCA is deliberately setting prices below its costs or the financial failure of competitors as a result of PRCA's pricing activities. We have closely examined Radiotelephone's arguments and conclude it has failed to make a *prima facie* case for the assertion of jurisdiction.

9. We particularly note that the complainant has failed to support its accusations with specific evidence and has not provided supporting material on the issue of intent. Radiotelephone has shown only a difference between its retail rates and those of PRCA, whereas PRCA has provided a detailed study supporting its position that its rates are indeed compensatory.[9] Indeed, all the complainant has continued to do throughout this proceeding and the prior licensing proceeding is to assert the abstract argument that a government corporation has certain potential business advantages when competing in the private sector. This is not a sufficient basis for the Commission to assert jurisdiction. We agree with Radiotelephone that it is PRCA's rates that are at issue. However, these rates are for intrastate services and absent evidence that a substantial federal question is involved, the Commission will not assert jurisdiction.

10. Radiotelephone also alleges that PRCA's status as a tax-exempt government agency provides it a significant competitive advantage and that the Commission should assert jurisdiction to consider an allegation of anticompetitive behavior. We are not presented with an allegation that a carrier's discriminatory pricing policies have impermissibly interferred with the Commission's licensing authority. Thus, there is nothing in the record to support our asserting jurisdiction in this case on this basis. While PRCA may enjoy a tax break, it may also be subject to offsetting factors such as the lack of access to equity capital or higher personnel and facility costs than Radiotelephone. PRCA's exemption may be an advantage, but it has not been shown to be an unfair one. Given the uncertain extent of the alleged advantage, we will not assert jurisdiction in the matter.[10]

11. In sum, we find that neither the allegations nor specific evidentiary support are sufficient to sustain an assertion that there is a colorable federal question at bar in this proceeding. Consequently, we grant the motion of PRCA and dismiss the complaint.[11]

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Motion filed by Puerto Rico Communications Authority requesting dismissal of the complaint filed by Radiotelephone Communicators of Puerto Rico, Inc. IS GRANTED.

13. IT IS FURTHER ORDERED that the above-captioned complaint filed by Radiotelephone Communicators of Puerto Rico, Inc. IS DISMISSED.

14. IT IS FURTHER ORDERED that the Motion filed by Puerto Rico Communications Authority to make allegations more definite and certain IS DISMISSED as moot.

15. IT IS FURTHER ORDERED that the Motion filed by Puerto Rico Communications Authority to partially dismiss the above-captioned complaint IS DISMISSED as moot.

16. IT IS FURTHER ORDERED that the Motion filed by Puerto Rico Communications Authority to hold the above-captioned complaint in abeyance IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] PRCA is an independent governmental corporate entity that was established by the Commonwealth of Puerto Rico through an act of its legislature, P.R. Laws Ann. tit. 27, §§ 291 *et seq.* (1942). By law, it is exempt from Puerto Rico Public Service Commission regulation, P.R. Laws Ann. tit. 27, § 296L (1942). PRCA provides interconnection services for radio common carriers and also offers paging and mobile radio services directly to the public. PRCA also provides approximately 10% of Puerto Rico's intra-island telephone service. The Puerto Rico Telephone Company (PRTC), another government corporation, provides the remaining 90% of the island's wireline telephone service.

[2] Radiotelephone is a privately-owned radio common carrier providing mobile radio service (one-way paging and two-way mobile) throughout the Commonwealth of Puerto Rico.

[3] The record in this proceeding contains a number of other pleadings filed over the last two years including a Partial Motion to Dismiss and a Motion to Hold the Complaint in Abeyance filed by PRCA, both of which were opposed by the complainant. In view of our findings in the instant order, we dismiss these motions as moot.

[4] *See supra*, note 1.

[5] Commonwealth of Puerto Rico, Puerto Rico Communications Auth., Mimeo No. 1238, at para. 5 (released Dec. 10, 1982).

[6] Commonwealth of Puerto Rico, Puerto Rico Communications Auth., Mimeo No. 6121, at para. 7 n.6 (released Aug. 25, 1983) (Reconsideration Order).

[7] PRCA submitted an independent report, "Paging System Financial Analysis," commissioned by PRCA which supported its position that PRCA's paging operations were self-sufficient and not cross-subsidized. Snavely, King and Associates, Paging System Financial Analysis (1986) (unpublished report). Complainants submitted no evidence in response to this analysis.

[8] *See , e. g.*, Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986); Benanti v. United States, 355 U.S. 96 (1957); California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986); Nat'l. Ass'n of Regulatory Comm'rs v. FCC, 746 F.2d 1492 (D.C. Cir. 1984); Diamond Int'l Corp. v. FCC, 627 F.2d 489 (D.C. Cir. 1980); Competitive and Effective Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910 (1987); South Central Bell Tel. Co., 2 FCC Rcd 196 (1987); Furnishing of Customer Premises Equipment by Bell Operating Tel. Cos. and Independent Tel. Cos., 2 FCC Rcd 143 (1987).

[9] *See supra*, note 7.

[10] The Commission has previously rejected the claim that Puerto Rico telephone companies should be precluded from providing interstate services because their tax-exempt status accorded them an unfair competitive advantage. Puerto Rico Facilities, Report and Order, 2 FCC Rcd 6000, 6612-13 (1987), *pet. recon. pending.*

[11] Because we have decided not to assert jurisdiction over this matter based on the record before us, we need not and do not address the effect of the *Louisiana and California* decisions on this Commission's jurisdiction in this context.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HOUSTON NETWORK, INC. File No. I-T-C-88-077

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 20, 1988 **Released April 29, 1988**

By the Acting Chief, International Facilities Division:

1. We have before us for consideration an application, filed on February 17, 1988, by Houston Network, Inc. (HNI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on March 2, 1988. No comments were received.

2. HNI, a Texas corporation, is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by HNI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-077 IS GRANTED and HNI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S., on the one hand, and Canada and Mexico and those points listed in those tariffs on the other hand.

5. Copies of any operating agreements entered into between HNI and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that HNI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC. — File No. I-T-C-88-076

Application for authority to acquire and operate facilities for service between Hawaii and the Republic of the Marshall Islands

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 20, 1988 **Released: April 29, 1988**

By the Acting Chief, International Facilities Division:

1. The captioned uncontested application, filed on February 12, 1988 by GTE Hawaiian Telephone Company, Inc. (HTC), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for the provision of private line service between Hawaii and the Republic of the Marshall Islands (Marshalls). Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of private line service between Hawaii and the Marshalls by HTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-076 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate one voice-grade satellite circuit between an appropriate earth station in Hawaii and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Marshalls furnished by HTC's correspondent in Majuro, the Marshalls; and

b. use said facilities to provide private line service between Hawaii and the Marshalls.

3. The Commission's temporary authority I-T-C-88-076/T-1) is hereby TERMINATED.

4. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in the Marshalls, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HANN F. NAJJAR File No. I-T-C-88-075

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 20, 1988; Released April 29, 1988

By the Acting Chief, International Facilities Division:

1. We have before us for consideration an application, filed on February 12, 1988, by Hann F. Najjar (Najjar), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on March 2, 1988. No comments were received.

2. Najjar, a resident of Virginia, is a start-up venture which proposes to resell international switched voice services in competition with other carriers already providing resale of such service. Najjar has filed the information required by the Commission pursuant to Section 63.01 of its Rules. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by Najjar.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-075 IS GRANTED and Najjar is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1 between the U.S., on the one hand, and Canada and Mexico and those points listed in that tariff on the other hand.

5. Copies of any operating agreements entered into between Najjar and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that Najjar shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONSORTIUM COMMUNICATIONS INTERNATIONAL, INC.

File No. I-T-C-88-070

Application for authority to acquire and operate facilities for telex service to Poland, Hong Kong and Mexico and points beyond

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 20, 1988; Released: April 29, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application, filed on January 28, 1988 and supplemented by letter of April 12, 1988 by Consortium Communications International, Inc. (CCI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to acquire and operate facilities for direct telex service between the U.S., on the one hand, and Poland, Hong Kong and Mexico, on the other hand. On March 18, 1988, WU World Communications Inc. (WU Worldcom) filed a Conditional Petition to Deny the application stating that "through hearsay corroborated by inferences drawn from declining traffic volumes," WU Worldcom had the feeling that CCI was already providing direct service to Poland in violation of the Communications Act. WU Worldcom states that if this "hearsay" is wrong and there is some other explanation not involving CCI for declining telex traffic between the U.S. and Poland, then it withdraws its conditional petition.

2. On March 28, 1988, CCI filed a Reply to the petition stating that the service it is presently providing to Poland is a "value-added, store-and-forward telex service" for which Commission authorization is not needed. The instant application is for direct telex service. Since there is no evidence on the record to show that CCI is providing service in violation of the Communications Act, we will consider the WU Worldcom Petition as withdrawn.

3. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct telex service to Poland, Hong Kong and Mexico by CCI.

4. Accordingly, IT IS ORDERED, that application File No. I-T-C-88-070 IS GRANTED, and CCI is authorized to:

a. lease from Comsat and operate one voice-grade satellite circuit between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Poland furnished by CCI's correspondent in Poland;

b. lease and operate one voice-grade circuit between the east coast earth station and CCI's New York operating office;

c. use the facilities in a. and b. above to provide telex srvice between the U.S. and Poland and points beyond;

d. lease from the appropriate IRC(s) and operate 12 telegraph-grade half-circuits between the U.S. and Hong Kong, and 12 telegraph-grade half-circuits between the U.S. and Mexico;

e. lease and operate connecting facilities between the CCI operating office and the operating office(s) of the appropriate IRC(s); and

f. use the facilities in d. and e. above to provide telex service between the U.S. and Hong Kong, between the U.S. and Mexico, and points beyond.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between CCI and its correspondents in Poland, Hong Kong, and Mexico, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

7. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur Service Rules to Grant Temporary Operating Authority to Novice Operator Examinees.

ORDER

Adopted: April 21, 1988; Released: April 29, 1988

By the Chief, Private Radio Bureau

1. On February 25, 1988, Angelo J. Polvere filed a petition to amend the amateur service rules to provide for immediate operating privileges for examinees who had successfully passed the Novice Class operator license examination. The petitioner's proposal requires each examinee to have a General Class or higher operator as a sponsor. Each successful Novice operator examinee would be given a temporary station call sign by the sponsor, consisting of the sponsor's station call sign and a unique designator. The sponsor would be required to keep records of such temporary Novice operators, their temporary station call signs, and addresses to provide a ready means of locating them should the need arise.

2. The petitioner states that it is important that a Novice operator examinee be able to instantly use the operating privileges, once the examination has been passed. The petitioner believes that, during the waiting period for the license document, enthusiasm wanes, skills are dulled, if not lost altogether, and knowledge is forgotten. The petitioner also believes that his proposal is simple, easy to administer and monitor, and capable of being put into effect very quickly.

3. In a recent action, the Chief, Private Radio Bureau (Bureau), denied a similar petition for rule amendment filed by Frederic G. Hambrecht [*See* 2 FCC Rcd 7548 (1987)]. In that proceeding, the Bureau found that the instant licensing proposal appeared to be contrary to the requirements of the international Radio Regulations (Geneva, 1979) which provide that each administration shall verify the operational and technical qualifications of any person who wishes to operate an amateur radio station. In addition, the Bureau found that application processing time is relatively short and that the benefits of instant licensing are marginal when compared to the disadvantages that could occur.

4. The instant petition presents no new or novel arguments that would justify rule making. It is repetitive and does not warrant action by the full Commission.

5. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), that the petition IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Reconsideration of Petition to
Amend the Amateur Service Rules
to Permit Auxiliary Operation
on Frequencies Between 52-54 MHz.

ORDER

Adopted: April 21, 1988; Released: April 29, 1988

By the Chief, Private Radio Bureau:

1. By letter of October 15, 1987, to George Bednekoff, the Chief, Private Radio Bureau, denied a petition requesting that Section 97.86(d) of the Commission's Rules, 47 C.F.R. § 97.86(d), be amended to authorize amateur stations in auxiliary operation to transmit on the 52-54 MHz segment of the 6 meter band. Mr. Bednekoff has filed a timely petition for reconsideration of that action.

2. In his petition for reconsideration, Mr. Bednekoff cites the Commission's *Order* in PR Docket 85-215, 51 Fed. Reg. 11759 (1986). In that proceeding, the Commission declined to expand the frequencies that are available for stations in auxiliary operation. Mr. Bednekoff contends that neither the Commission's *Order* in PR Docket 85-215, *supra*, nor the comments in that proceeding addressed the question of adding the 52-54 MHz segment for auxiliary operation. He contends that auxiliary operation in the 52-54 MHz segment is feasible because there are relatively few repeater stations operating in that segment that would be disrupted by the operation of amateur stations being used to provide auxiliary links.

3. Mr. Bednekoff has not raised any new issues. Contrary to the petitioner's assertion, the comments in the cited proceeding did refer, unmistakably, to the 52-54 MHz segment. In paragraph 3 of the *Order*, *supra*, the Commission said:

> The ARRL argues that those contentions [options including in-band control and cross-band operation] fail to take into account questions of spectrum efficiency stemming from the use of HF *and low - VHF amateur frequencies for auxiliary operation*. The ARRL points out that path lengths for fixed-link, remote control or relay auxiliary operation are generally short, *thus failing to justify use of frequencies below 220. 5 MHz*.[1] (Emphasis added).

4. After careful consideration, the Commission, in the cited *Order*, *supra*, concluded not to expand auxiliary operation in the amateur service. The Commission said that the comments in that proceeding showed that the rules presently reflect a good match between the frequencies authorized for auxiliary operation and auxiliary link functions. In addition, the Commission found no justification for using spectrum below 220.5 MHz for auxiliary links.[2]

5. The Commission's previous action with respect to the expansion of auxiliary operation is dispositive of the instant petition for reconsideration. No new issues have been raised by Mr. Bednekoff.

6. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.429(a) and (i) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.429(a) and (i), that the petition for reconsideration of George Bednekoff IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 51 Fed. Reg. 11759, 11760 (1986).

[2] Id.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-5

In the Matter of

Amendment of §§ 22.501 (g)(2) and 94.65(a)(1) of the Rules and Regulations to Re-Channel the 900 MHz Multiple Address Frequencies	RM-5206
Amendment of § 94.65(a)(1) of the Rules to Revise Footnote 3 in the Frequency Table to Make the Frequencies Available for use by any Part 94 Eligible	RM-5362
Amendment of Part 2 and §§ 94.63(d)(5) and 94.65(a)(1) Footnote 3 of the Rules to Permit Operation of Mobile Remote Meter Reading Systems on a Primary Basis on the Exclusive Power Radio Service Frequencies in the 952.3625 - 952.8375 MHz Band	RM-5178
Amendment of Part 94 of the Rules to Permit Intrasystem Communications Among Multiple Address System Master Stations	RM-5383

ERRATUM

Released: April 29, 1988

On March 14, 1988, the Commission released a Report and Order (FCC 88-68, 53 Fed. Reg. 11855 April 11, 1988) in the above captioned proceeding. This document makes corrections to Appendix B as shown below. Also, to correct an administrative error, the effective date of the rule changes specified in paragraph 73 of the text is hereby changed to May 11, 1988.

1. In Section 94.65(a)(1) the grandfathering date for 25 kHz channels is hereby changed to May 11, 1988.

2. In Section 94.71 the current paragraphs (c)(3) and (c)(4) are renumbered to (c)(5) and (c)(6) to read as follows:

§ 94.71 Emission and bandwidth limitations

* * * * *

(c) * * *

(5) For Digital Termination System channels operating in the 10,550-10,680 MHz band.

* * * * *

(6) For Digital Termination System channels operating in the 17,000-19,000 MHz band.

* * * * *

3. In Section 94.73(a) the Table is amended by revising footnote 1 and 3 to read as follows:

(a) * * *

[1] For multiple address operations see Section 94.65(a)(i)(iv).

* * * * *

[3] For multiple address operations see Section 94.65(a)(i)(iv). When an omnidirectional transmitting antenna is authorized in the 2150-2160 MHz band, the maximum power shall be 60dBm.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur
Service Rules Concerning
Amateur Operator License
Examination Requirements for
Senior Citizens.

ORDER

Adopted: April 21, 1988; Released: April 29, 1988

By the Chief, Private Radio Bureau

1. On February 1, 1988, Shannon Cisco filed a petition to amend Section 97.23 of the Commission's Rules, 47 C.F.R. § 97.23, concerning examination requirements for amateur service licensees at least sixty-five years of age. The petitioner requests that the licenses of all such senior citizens who have held amateur operator licenses for twenty years or more be upgraded as follows: Advanced Class to Amateur Extra Class, General Class to Advanced Class, and Technician Class to General Class.

2. The petitioner states that a senior citizen who has met the twenty year requirement is qualified for the license upgrade without further examination. The petitioner argues that exemption from the examinations would be beneficial to many senior citizens who cannot travel to examination points because of physical disabilities. In order for a senior citizen's license to be eligible for the upgrade under the requested rule revision, the senior citizen must have held the particular class of operator license for at least twenty years. Further, for the upgrade of the Technician Class operator license, the senior citizen also must have successfully passed the written examination for the General Class operator license.

3. Amateur operator licenses are issued only to persons who demonstrate certain operational and technical skills, including proficiency in telegraphy. The requirement that only a qualified person can hold an amateur operator license is based upon provisions in the international Radio Regulations, Nos. 2735 and 2736 (Geneva, 1979) and the Communications Act of 1934, as amended, 47 U.S.C. § 303(l)(1). The Commission does not waive the telegraphy or the written examination for any applicant.

4. The precedent for this policy was established in a proceeding where the issue before the Commission was whether amateur operator license applicants with various disabilities should be exempted from telegraphy examinations. In the *Report and Order* in General Docket No. 78-250, 47 Fed. Reg. 14197 (1982) at 14198, the Commission said:

> After careful consideration of the issues and comments in this proceeding, it appears that selecting a particular group of license applicants for favorable treatment in terms of less stringent amateur operating requirements would not be a sound licensing policy. For example, if such a policy were instituted, the Commission ultimately could find itself in the untenable position of deciding which applicants actually qualified for telegraphy exemptions and which did not. Commission personnel clearly are not trained to make such judgments. Therefore, if we decide to introduce a class of amateur radio operator license without telegraphy requirements, it will be available to any applicant, instead of limited to applicants with certain physical or learning disabilities.

5. Moreover, difficulty in traveling to an examination point is not a problem under the present examination systems. The examinations are prepared and administered by amateur operators who volunteer their services. They can accommodate examinees whose physical disabilities require special procedures. For instance, an examination may be administered at a place more convenient to a handicapped examinee -- usually in the home.

6. The instant petition seeks to reverse long-standing Commission policy regarding the requirements that applicants must meet in order to obtain an amateur operator license. The petition presents no new facts or novel arguments that would justify such a policy change. Accordingly, the petition is repetitive and does not warrant action by the full Commission.

7. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), that the petition to amend Section 97.23 IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur Service Rules to Reduce the Number of Classes of Operator Licenses.

ORDER

Adopted: April 21, 1988; Released: April 29, 1988

By the Chief, Private Radio Bureau

1. On February 19, 1988, Larry Ballentine filed a petition to amend Section 97.5 of the Commission's Rules, 47 C.F.R. § 97.5, to reduce the number of amateur operator license classes from five to four by merging the Technician Class with the General Class operator license. Additionally, the petitioner asks that the international Morse code telegraphy (telegraphy) examination requirement for the four remaining classes of operator licenses, Novice, General, Advanced, and Amateur Extra, be reduced to 5 words per minute and the scope of the examination limited to the alphabet and the numerals 0-9. As an alternative, the petitioner requests that a written test be administered where the examinee demonstrates only a knowledge of the sequence of dots and dashes that make up the letters of the alphabet and the numbers 0-9.

2. Under the petitioner's proposal, the four classes of licenses would be differentiated only on the basis of the current written examinations covering technical and regulatory matters, independent of proficiency in telegraphy.

3. The petitioner also suggests that amateur licensees be given access to the incentive telegraphy band segments on the basis of (1) endorsements for passing the 13 and 20 words per minute examinations, or (2) code speed certificates for those speeds issued by volunteer-examiner coordinators (VECs).

4. The petitioner states that operator license privileges should be based on technical ability and knowledge of the amateur service rules, not on proficiency in telegraphy. The petitioner argues that telegraphy is being supplanted by other forms of communication. He notes that, with the improvement in communications technology, voice is being used during natural disasters, not telegraphy. He argues, further, that the amateur service must be modernized and deregulated so that its ranks will continue to grow.

5. The petition, in effect, seeks to revise the existing amateur operator license structure, requirements and privileges. The Commission's Rules concerning amateur operator privileges, as contained in Part 97, 47 C.F.R. §§ 97.1-97.523, were adopted after careful consideration was given to thousands of comments filed by interested parties in five major rule making proceedings.[1] The operator license classes and associated privileges were developed to provide motivation for amateur operators to advance their skills in both the communications and technical phases of the radio art. Nothing in the instant petition indicates that the basic structure of the amateur service is not achieving its goals.

6. We believe that operator privileges should continue to be based on telegraphy skills, as well as on expertise in technical, operational and regulatory matters. The petition ignores the important role that telegraphy continues to play in the amateur service, particularly in emergency communications during natural disasters when communications may be affected by weather, poor propagation and interference. In short, petitioner's views are contrary to the Commission's findings expressed in PR Docket No. 83-28[2].

7. The instant petition proposes to revise the structure and requirements for amateur operator licenses, issues that have been decided by the Commission in previous proceedings. Accordingly, the petition is repetitive and does not warrant action by the full Commission.

8. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.401(e) of the Commission's Rules, 47. C.F.R. §§ 0.331 and 1.401(e), that the petition to amend Section 97.5 IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Docket 9295, 16 Fed. Reg. 1237 (1951); Docket 10173, 18 Fed. Reg. 136 (1953); Docket 15928, 32 Fed. Reg. 12682 (1967); Docket 20282, 41 Fed. Reg. 25013 (1976) and 43 Fed. Reg. 15324 (1978); and, PR Docket 86-161, 52 Fed. Reg. 5115 (1987).

[2] 49 Fed. Reg. 1097, 1100 and 1102 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH AMERICAN EXPRESS — File No. I-T-C-88-050

Application for authority to resell services of other carriers to provide international telegram, telex and telefax services between the U.S. and various international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 21, 1988; Released: April 29, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application, filed on December 9, 1987 by South American Express (SAE), requesting authority, pursuant to Section 214 of the Communications Act of 1934, to resell the telex services of WU World Communications Inc. (WU Worldcom, formerly ITT World Communications Inc.), and RCA Global Communications, Inc. (RCA) to provide telegram and telex service, and to resell the switched voice services of AT&T Communications (AT&T), MCI Telecommunications (MCI) and US Sprint Communications Company (US Sprint) to provide telefax (facsimile) service. The application was placed on public notice on December 23, 1987. No comments were received.

DISCUSSION

2. The majority of recent international resale applications we have granted have been from entities seeking to provide international switched voice services through the resale of the international switched voice services of existing international carriers. The subject SAE application differs from these applications in that SAE does not seek authority to resell the international switched voice services of AT&T, MCI and US Sprint to provide international switched voice service but, rather, to provide international facsimile service, a non-voice service. In addition, the SAE application seeks authority to provide both international telegram and telex service by resale of WU Worldcom's and RCA's international telex service. Therefore, the SAE application raises a number of issues which are not present when considering applications for the resale of international switched voice service for the provision of international switched voice service.

3. Turning first to SAE's request to resell the international switched voice services of AT&T, MCI and US Sprint for the provision of facsimile service, we note that the tariffs of MCI and US Sprint do not contain any limitations on the use of their international switched voice service for non-voice transmission. However, AT&T's switched voice tariff does contain a limitation on the use of its Long Distance Message Telecommunications Service (LDMTS) for non-voice transmission to some points. Section 2.2.2. of AT&T's tariff F.C.C. No. 1 at 8th revised page 22 (effective April 28, 1987) states:

> Non-voice Transmission-LDMTS may be used for non-voice transmission to all points other than Mexico (except non-voice facsimile transmission may be used to Mexico) and those certain foreign countries or areas as specified in 3.4.4. and 3.4.8. following.

Section 3.4.4. of AT&T's tariff F.C.C. No. 1 at 21st revised page 77 (effective April 1, 1987) and 21st revised page 78 (effective March 23, 1987) lists a number of countries and points to which its LDMTS service may not be used for non-voice transmission.[1]

4. Venezuela, which is one of the countries included in SAE's list of countries' to which it seeks authority to provide facsimile service, is one of the countries to which AT&T's tariff prohibits the use of LDMTS for non-voice transmission. Since all users, including resale carriers, are bound by the conditions and restrictions in the tariffs of the carriers offering the service, the prohibition in AT&T's tariff F.C.C. No. 1 on non-voice transmission to Venezuela precludes SAE from providing facsimile service to that country by resale of AT&T's LDMTS service. However, since MCI and US Sprint both offer switched voice service to Venezuela with no limitation on non-voice transmission, we need not deny SAE's request to provide facsimile service to Venezuela through the resale of those carrier's services.[2]

5. We shall limit our grant of authority to SAE to provide international telegram and telex service by resale of WU Worldcom's and RCA's telex service and to provide international facsimile service by resale of the international switched voice services of AT&T, MCI and US Sprint to those countries which SAE specifically requests authority to serve. In recent decisions authorizing entities to provide international switched voice service on a common carrier basis by the resale of the switched voice services of existing U.S. carriers, we have granted the applicants authority to provide switched voice service by resale to all of the points currently or hereafter listed in the international switched voice service tariffs of the carrier or carriers whose services are being resold. However, we would note that, where the service being provided by the resale carrier is the same as that being resold, there is likely to be little, if any, effect on the foreign correspondent of the U.S. carrier whose service is being resold.

6. For example, a telephone call from the United States to another country provided by a carrier reselling the switched voice service of AT&T, MCI, US Sprint or other U.S. carrier is not likely to produce operational or economic effects on the foreign correspondent that differ from those that would occur if the U.S. customer placed the call directly with the U.S. carrier whose service is being resold. Under such circumstances, there would appear to be little or no need for such a U.S. resale carrier to obtain its own operating agreements with the foreign correspondent of the U.S. carriers whose services are being resold. Because of this factor and the fact that the reselling carrier is bound by the terms and conditions of the tariffs of the carriers whose services are being resold,

we belive that we retain sufficient control over the resold voice service by means of our control over the authorizations and tariffs of the carriers whose services are being resold.

7. The resale of one international service, such as switched voice service, to provide a different international service, such as facsimile service, as is the case in the instant application could well present a different situation. In such a case, additional or different action or equipment may be required on the part of the underlying U.S. carrier's foreign correspondent. The economic effects of the foreign correspondent might differ. Consequently, it is possible that U.S. resale carriers which resell one international service of an underlying U.S. carrier to provide a different international service may be required to obtain operating agreements or other instruments of authorization by the foreign correspondent or other authorities in some countries. [3]

8. We would also note that its international competitive carrier decision, International Carrier Policies, 102 FCC 2d 812 (1985), the Commission found that each foreign country constituted a separate geographical market. The Commission indicated that this finding was based primarily on the need for a carrier to obtain an operating agreement prior to providing service to a given country. *See* 102 FCC 2d at p. 828. The Commission further found that non-dominant carriers should be required to receive an initial Section 214 certificate to provide a given service product to a country. *See* 102 FCC 2d at p. 844. We believe that because of the potential that U.S. resale carriers which provide international services different from the international services being resold may need to obtain operating agreements or other forms of authority from the correspondents or other authorities in the countries to which they seek to provide service, it is appropriate that such resale carriers be granted initial Section 214 certifications to each country (geographical market) for each service product in accordance with the procedure set forth in the Commission's international competitive carrier decision.[4] Therefore, we shall authorize SAE to provide service only to those countries specifically listed in its application as filed.

9. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[5] We find that the market will support additional carriers and that the added competition will be in the public interest.[6]

10. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international telegram, telex and facsimile service by SAE.

11. Accordingly, IT IS ORDERED that application File No. I-T-C-88-050 IS GRANTED and SAE is authorized to:

a. provide international telegram and telex service by resale of the telex service set forth in WU World Communications Inc.'s Tariff F.C.C. No. 12 and RCA Global Communications, Inc.'s Tariff FCC No. 90 between the contiguous United States and the countries listed in the Appendix hereto; and

b. provide international facsimile service by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the contiguous United States and the countries listed in the Appendix hereto.

12. SAE shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.R.F. Part 61, for the services authorized in this Order.

13. Copies of any operating agreements entered into between SAE and its correspondents shall be filed with the Commission within 30 days of their execution.

14. This order is issued under Section 0.291 of the Commission's rules and is effective upon its adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities
Division
Common Carrier Bureau

APPENDIX

Argentina Mexico
Belize Panama
Bolivia Paraguay
Brazil Peru
Chile Portugal
Colombia Spain
Costa Rica Switzerland
Dominican Republic Trinidad and Tobago
Ecuador Uruguay
El Salvador Venezuela
Guatemala
Guyana
Haiti
Honduras
Jamaica

FOOTNOTES

[1] These countries are: Algeria, Antarctica (Casey Base); Bhutan; Burma; Burundi; Christmas and Cocos Island (Indian Ocean); Easter Island; Fiji Islands; Iran; Ivory Coast, Republic of; Kiribati; Malaysia; Nauru; Nigeria, Federal Republic of; Norfolk Island; Pitcairn Island; Rwanda; Solomon Islands; Sudan; Syrian Arab Republic; Tunisia; and Venezuela. Since SAE requests authority to provide its service only from the contiguous United States, we have listed only those countries to which non-voice transmission via LDMTS is prohibited from the U.S. mainland under AT&T's tariff. We would note that AT&T's tariff also contains a list of countries to which LDMTS may not be used for non-voice transmission from Hawaii. That list of countries differs significantly from the one set forth above.

[2] While AT&T's tariff generally prohibits non-voice transmissions via LDMTS to Mexico, facsimile transmission is permitted. Therefore, we need not deny SAE's request to provide facsimile service to that country.

[3] For example, in a Memorandum Opinion and Order, File No. I-T-C-84-081, (released July 3, 1984), (MO&A), the Commission by delegated authority, granted Instafax International, Inc. (Instafax) authority to provide digital facsimile services to Hong Kong by resale of AT&T's International Message Telecommunications Service. The MO&O stated that Instafax indicated that it had conducted preliminary discussions with Cable and Wireless (Hong Kong) Ltd., a prospective foreign correspondent in Hong Kong. On July 12, 1984, Instafax filed, pursuant to the provisions of Section 43.51 of the Commission's Rules, 47 C.F.R. 43.51, copies of a Business Registration Certificate issued by the Government of Hong Kong; a Public Non-Exclusive Telecommunications Service License granted by the office of the Postmaster General of Hong Kong; and an operating agreement between Instafax and Cable and Wireless (Hong Kong) Ltd.

[4] Because SAE is reselling services rather than acquiring specific facilities, it need not file the circuit addition reports required by Section 63.10(b) of the Commission's Rules, 47 C.F.R. 63.10(b).

[5] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[6] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-497

In the Matter of
Amendment of Part 65 of
the Commission's Rules to
Prescribe Components of the
Rate Base and Net Income
of Dominant Carriers

ERRATUM

Released: April 29, 1988

The Report and Order in the above entitled proceeding (FCC 87-391, mimeo 37242) adopted December 17, 1987, released December 24, 1987, contained an error in Appendix B. Section 65.820 of Appendix B should be corrected to designate the paragraph of Section 65.820 as (a)-(d)(5) instead of (1)-(e). In addition, the phrases "net of accumulated depreciation and amortization" and "net of accumulated amortization" should be inserted in paragraph (a) as follows:

§ 65.820 Included Items

(a) Telecommunications Plant. The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service), Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization and Account 2003 (Telecommunication Plant Under Construction - Short Term), and to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommunications Plant Adjustment), net of accumulated amortization.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Amendment of Part 21 of the Rules and Regulations to Establish an Allocation in the 6425-6575 MHz Band for Interexchange Common Carriers — RM-5879

ORDER

Adopted: April 7, 1988; Released: April 29, 1988

By the Commission:

INTRODUCTION

1. By this action the Commission denies a Petition for Rule Making filed by Communications Transmission, Inc. (CTI), requesting that the Commission amend Part 21 of its rules to allocate the 6425-6575 MHz band to the fixed service for use by interexchange common carriers.

CTI Petition

2. CTI is an interexchange common carrier presently operating in the 5925-6425 MHz band. CTI claims that it is at a competitive disadvantage with respect to American Telephone and Telegraph (AT&T). CTI alleges that there is a lack of suitable frequencies available for interexchange service because prior to the AT&T divestiture the majority of the frequencies allocated for interexchange service were already licensed to AT&T and the Bell operating companies. [1]

3. CTI proposes to remedy this by reallocating the 6425-6575 MHz band to the fixed service for use by interexchange common carriers. The 6425-6575 MHz band consists of two segments. The 6425-6525 MHz segment is allocated to the mobile service. It is currently used by the local television transmission service (LTTS). Recently, the Commission also made this band available to broadcasters, cable system operators, network entities and private users for transmission of mobile video. [2] The 6525-6575 MHz segment is allocated currently to the fixed service for private use. This band is used primarily by electric utilities, railroads, and the petroleum industry for long-haul voice and data service.

4. CTI states that the chief advantage of the requested allocation is that it would allow use of existing 6 GHz towers. CTI maintains that alternative frequency bands available for interexchange service are not satisfactory. The interexchange common carriers are authorized channels in the following bands: 2100-2130 and 2160-2180 MHz (2 GHz), 3700-4200 MHz (4 GHz), 5925-6425 MHz (6 GHz), and 10,700-11,700 MHz (11 GHz). CTI states that, while the 2 GHz band has the advantage of long-range signal propagation, the bandwidth is so narrow that the channel capacity is too limited to be economically feasible. CTI claims that the 4 GHz band is particularly troublesome because it must be shared with the fixed satellite service and, as a consequence, coordination with the vast number of satellite earth stations becomes extremely difficult. Moreover, CTI states that a contiguous system in the 4 GHz band is not feasible along CTI's existing route due to potential interference with other carriers' systems. The 11 GHz band has a reliable signal propagation distance of roughly ten miles and is impractical for long haul transmission, according to CTI. CTI states that use of the 11 GHz band would require twice the number of towers as the 6 GHz band, rendering the 11 GHz band economically unsuitable. CTI asserts that use of single sideband (SSB) technology to increase the capacity of its existing 6 GHz system is an inadequate alternative because SSB is more susceptible to fading and thus is less reliable. CTI claims that use of SSB technology necessitates use of a full space diversity scheme. According to CTI, a redundant tower and receiver antenna would have to be constructed to provide the same transmission quality as non SSB transmissions.

5. CTI states that other alternatives also are not viable. CTI claims that use of satellites is not a viable solution because satellites cannot yet compete economically for short-haul domestic traffic. CTI argues that access to most communications satellites is achieved through single wide-area coverage antennas, whose beams are shaped to best serve an expansive geographic area, rather than the distance between, for instance, Akron and Pittsburgh. Also, CTI maintains that satellite transmissions yield inferior sound quality due to echo and signal delay problems. According to CTI, sound quality is particularly important in light of the competition among carriers. CTI states that use of fiber optics is not satisfactory because of the high cost of installing fiber across the country.

6. CTI alleges that reallocation of the 6425-6525 MHz band to interexchange common carriers would have little impact on the local television transmission service because LTTS usage is light and many other channels are available. CTI points out that the Commission has allocated 383 separate simplex channels for non-broadcast video service throughout the country.[3] By way of comparison, CTI claims there are only 21 microwave channels suited for suppliers of long distance common carrier service. These consist of 13 duplex channels in the 3700-4200 MHz band and 8 duplex channels in the 5925-6425 MHz band. According to CTI, new eligibles in the 6425-6525 MHz band would not be harmed because they have not yet established operations in this band. CTI maintains that its proposal will have little impact on private fixed services in the 6525-6575 MHz segment of the band, basing this conclusion on a frequency coordination study it conducted showing there is little potential for interference. [4]

7. Interexchange common carriers, including Eastern Microwave Inc., MCI, and Western Telecommunications Company, Inc. support CTI's petition and reiterate the points raised by CTI. Opposition to CTI's petition was expressed by LTTS operators, broadcast interests and private microwave network operators. Generally, these parties argue that several alternatives are available to CTI to increase communications capacity without additional allocations. Further, opponents of the petition maintain that existing and planned operations in the 6425-6575 MHz band would be affected severely by CTI's requested reallocation. A complete list of parties who filed comments and replies is provided in the appendix.

8. LTTS and private fixed service users argue that CTI has not demonstrated that an additional frequency allocation is needed for interexchange service. They state that the licensing statistics referenced by CTI are not relevant to the issue of whether the existing frequency bands available for interexchange service are at or near capacity. Further, they argue that various options, including use of other frequency bands, more efficient use of the 6 GHz band, satellite service and fiber optics are more viable alternatives than the reallocation proposed by CTI. BellSouth, in particular, maintains that use of alternative modulation schemes, parallel routes, and other frequency bands in congested areas, together with fiber and satellite in an evolving network can overcome the problems claimed by CTI. BellSouth indicates that a combination of various relief methods should be considered, not a single remedy that could apply along CTI's entire microwave system.

9. BellSouth and Bell Atlantic point out that SSB technology is already in use in 6 GHz interexchange systems. [5] BellSouth adds that other carriers have found ways to effectively use satellite technology to carry a portion of the longest distance traffic, thereby relieving capacity shortages on many intermediate links. According to BellSouth, echo from satellite transmissions can be resolved with echo suppressors and transmission delay can be reduced to acceptable levels by splitting the two directions of transmission between wireline and satellite.

10. Ameritech, Bell Atlantic Company, BellSouth Corporation and Pacific Bell, contend that the requested reallocation would effectively terminate LTTS operations in the 6425-6525 MHz band. They state that if interexchange service were to expand into this band, it would not be possible for LTTS operations to avoid causing interference. Since interference would not be permitted and cannot be tolerated by the interexchange service, LTTS operators would have to severely limit or discontinue service. LTTS interests contend that CTI's assertions regarding the availability of alternative frequencies for LTTS are misleading. They maintain that CTI's listing of video channels is grossly inflated due to double counting channels when the channels are available to several services. For example a channel available for both broadcast auxiliary and common carrier use was, according to the LTTS users, counted as two channels. Further, LTTS interests point out that the vast majority of channels referenced by CTI are allocated for fixed service and are not suitable for sharing with a mobile service such as LTTS. LTTS interests assert that the 6425-6525 MHz band is the band of choice for LTTS due to the relatively poor propagation and sharing requirements for higher frequency bands available for LTTS. CBS and the Association of Maximum Service Telecasters also oppose CTI's petition. They contend that the proposed reallocation would sharply diminish or eliminate the relief the Commission recently granted in making broadcasters eligible to operate in the 6425-6525 MHz band on a primary basis. [6]

11. The American Petroleum Institute (API) and the Utilities Telecommunications Council (UTC), representing users of the Private Operational-Fixed Microwave segment of the band sought by CTI (6525-6575 MHz), state that CTI fails to address the adverse impact the proposed reallocation of spectrum would have on private fixed users. API states that assignments in this spectrum are utilized heavily by the petroleum and natural gas industries. UTC points out that this band is essential to the provision of vital utility services to the nation. Both API and UTC claim that the requested reallocation would prevent private users from expanding their existing microwave systems to meet their legitimate communications needs. API and UTC challenge CTI's frequency coordination study, saying that private users did not respond to CTI's frequency coordination requests because the proposed operation is not currently permitted.

DISCUSSION

12. We have carefully reviewed the arguments presented by CTI and are not persuaded that the requested allocation is warranted. No evidence has been provided that there exist areas where CTI has been unable to establish a microwave path using the existing frequency bands available for interexchange service. We agree with API and UTC that the statistics provided by CTI on the percentages of licenses held by AT&T and the Bell operating companies are not persuasive with regard to the issue of whether the existing frequency bands are sufficient for interexchange service. CTI has not demonstrated any clear relationship between the number of licenses granted to AT&T and CTI's alleged competitive disadvantage. We note that AT&T and the former Bell operating companies hold less than half of the licenses in the 6 GHz band. Clearly, considerable competition exists.

13. The arguments presented by CTI regarding the inadequacies of the various alternatives to the requested reallocation are not compelling. While the entire 4 GHz band may not be available along the full length of CTI's system, it appears that parts of the band may be available along substantial portions of the system. Thus, 4 GHz frequencies could be used to increase capacity along parts of the system and new towers would not be required to use these frequencies. The 11 GHz band also has frequencies available and may be suitable for communications paths near urban centers, where the 4 and 6 GHz bands may not have channels available. Construction of parallel microwave paths is another alternative that is available. We also believe that improvements in spectrum efficiency are possible within the existing 6 GHz band. SSB technology is already being used by other operators in the 6 GHz band and could apparently double CTI's capacity. [7] we recognize that these options may be more costly than the relief that would be provided by the requested reallocation, however, where spectrum demand is great it is not unreasonable to encounter increased costs.

14. We also find that alternative solutions to microwave now exist for increasing communications capacity. Industry data demonstrates that fiber optic cable is available along the routes that CTI plans to use and that considerable excess capacity is available.[8] Accordingly, CTI need not construct its own fiber optic cable. We recognize that satellites have limitations, however, satellite links could be used for communications between distant points (i.e., New York and Los Angeles). This would relieve demand along the ground-based microwave network.

15. Contrary to CTI's assertions, we believe that existing eligibles in the frequency band sought by CTI could be impacted severely by the requested reallocation. Mobile video links currently permitted in the 6425-6525 MHz segment would have to avoid paths used for fixed service. This would sharply limit mobile operations, particularly in urban areas where a proliferation of fixed links could effectively preclude mobile video services from operating

in this band. The 6425-6525 MHz band is the principal band used for LTTS. Alternative frequencies at 13 GHz available for LTTS suffer from reduced range. Broadcasters, cable operators, network entities and private users were recently made eligible to operate mobile video services in the 6425-6525 MHz band due to inadequacies in existing allocations for these services. [9] Allocating this band for fixed service would mitigate the relief made available by this earlier action.

16. With regard to the 6525-6575 MHz segment, the Commission also recently expanded eligibility to include persons engaged in a commercial activity and persons seeking to establish systems solely to provide private carrier communications service to other persons eligible under Part 94. [10] This action was taken to accommodate the needs of many users (such as retail stores, financial institutions, hotels, service businesses, etc.) for long-haul voice and data circuits. CTI's proposal would negate the benefits of this action. Insufficient time has passed to expect implementation of systems by new eligibles in either the 6425-6525 MHz or 6525-6575 MHz segments. We believe our prior actions expanding eligibility better serve the public interest than the reallocation CTI requests. By expanding eligibility we provided for needs that could not be satisfied in other ways. In contrast, several alternatives to additional spectrum allocations are available to CTI, as explained above.

17. In summary, we find that a) CTI has not presented sufficient evidence that additional spectrum for interexchange service is needed, b) there are several options open to CTI to increase the communications capacity of its system, and c) the proposed reallocation would severely impact existing and new eligibles in the 6.4 GHz band. Accordingly, for the reasons given in the foregoing discussion, IT IS ORDERED That the CTI petition for allocation of the 6425-6575 MHz band, for use by the interexchange common carriers, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX

The Following Parties Filed Opposition Comments in the Proceeding:

American Petroleum Institute
Ameritech
Association of Maximum Service Telecasters
Bell Atlantic Company
BellSouth Corporation
CBS
Contel ASC
CTI
Eastern Microwave Inc.
M/A Com
MCI Telecommunications Corporation
Pacific Bell
United States Transmission Systems, Inc.
Utilities Telecommunications Council
Western Telecommunications Company, Inc.

The Following Parties Filed Reply Comments in the Proceeding:

CTI
MCI

FOOTNOTES

[1] A study of channels allocated for interexchange service performed by Bethesda Research Institute (BRI) is attached to CTI's petition This study indicates that AT&T and the former Bell operating companies are the licensees of over ninety percent of the hops (paths) in the 4 GHz (3700-4200 MHz) band and forty eight percent of the hops in the 6 GHz (5925-6425 MHz) band. CTI asserts these two frequency bands are the best suited for long distance service. There are 13 duplex channels in the 4 GHz band and 8 duplex channels in the 6 GHz band. CTI's proposal would add 2 additional duplex channels in the 6 GHz band.

[2] *See Third Report and Order*, Gen. Docket No. 82-334, 2 FCC Rcd 1050 (1987), 52 FR 7136 (March 9, 1987) and *Memorandum Opinion and Order on Reconsideration of Third Report and Order*, Gen. Docket No. 82-334, 2 FCC Rcd. 6750 (1987), 52 FR 43588 (November 13, 1987).

[3] CTI states that, 383 simplex channels are available for video transmission purposes.

[4] CTI retained Comsearch to conduct frequency coordination with fixed users of the 6425-6575 MHz band. CTI states that the frequency coordination effort was conducted in the 6425-6575 MHz band over the entire CTI system nationwide.

[5] MCI indicates that it has developed and deployed SSB radios resulting in more than doubling the analog capacity on existing 6 GHz routes from 16,800 channels to 37,800 channels. MCI also indicates that further improvements in spectrum efficiency may be possible. Nevertheless, MCI supports CTI's requested reallocation.

[6] *See* note 2, *supra*.

[7] CTI states that full space diversity is required to insure quality when implementing SSB technology and that space diversity would be cost prohibitive. However, CTI already uses space diversity according to the commenters.

[8] *See* Washington Post, business section, August 31, 1987, p. 1, 24. *Also see* Fiber Deployment as of Year End 1986, prepared by Jonathan Kraushaar of the Common Carrier Bureau. *See* FCC press release dated December 31, 1986, mimeo number 1292. Much of the cable is being installed by carriers who previously used microwave for long haul routes. Activation of the cables should lead to the surrender of microwave licenses. *See, e.g.*, 47 C.F.R. Section 21.44(a)(3); 21.303(d). These rule sections state that when microwave users discontinue service they must surrender their license to the Commission.

[9] *See* Third Report and Order, Gen. Docket No. 82-334, *supra*, at 28-29.

[10] *See* Third Report and Order, Gen. Docket No. 82-334, *supra*, at 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters for
FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1988; Released: April 29, 1988

By the Commission:

INTRODUCTION

1. The Commission has before it two petitions for reconsideration of the *Second Report and Order* (*Second Report*) [1] in this proceeding. One petition, filed by Brown Broadcasting Service, Inc. on November 5, 1987, requests that the Commission reconsider and modify its action that amended Section 73.213 of the rules, which governs relocations and modifications of grandfathered short-spaced FM stations. The other petition, filed by Eric R. Hilding on November 6, 1987, requests that the Commission reconsider and modify its action that amended Section 73.211 of the rules, which sets forth power and antenna height requirements for each of the six classes of FM stations. No comments were filed in response to either petition.

BACKGROUND

2. We initiated this proceeding with a *Notice of Proposed Rule Making* (*Notice*) [2] that proposed minor adjustments to certain rules that were affected by our actions in BC Docket No. 80-90 [3], but were not given detailed consideration in that proceeding. In the *Notice*, we also proposed a new method for classifying FM stations and revision of certain technical rules that needed updating.

3. More than 400 parties filed comments or reply comments in response to the *Notice*. In January 1987, we adopted a *First Report and Order* [4] resolving two of the issues in the *Notice*. Subsequently, in September 1987, we adopted the *Second Report* addressing the remaining issues. In the *Second Report*, we set forth a definitive method for classifying FM stations according to their effective radiated power (ERP) and antenna height above average terrain (HAAT). Also, we amended our rules to limit relocations and modifications of grandfathered short-spaced FM stations, allowing only those that would not increase the potential for interference.

ISSUES

4. *The Brown Petition*. Brown Broadcasting Service, Inc. (Brown) is the licensee of station WBRU, Channel 238B, Providence, Rhode Island. WBRU is a commercial station staffed primarily by students at Brown University. WBRU is also a grandfathered short-spaced station,[5] and thus is subject to Section 73.213 of the Commission's rules, which governs modifications and relocations for these stations. Brown claims that WBRU would be adversely affected by the Commission's revision of that section of the rules.

5. Brown states that it is in the middle of an extended process to obtain a new tower site. At the new site, Brown believes that WBRU would be able to operate with 50,000 watts effective radiated power. Brown fears that newly amended Section 73.213 will prevent WBRU from moving to this new site because, in effect, the amended rule limits each grandfathered short-spaced station to the predicted coverage (in the direction of other grandfathered short-spaced stations) which that station actually had on the effective date[6] of the *Second Report*.[7] On this date, WBRU was operating with a lower power (20,000 watts) at what it considers to be a temporary site.[8] Brown does not want WBRU's coverage to be limited in the future to that provided by the lower power at the temporary site. As a remedy, Brown requests that the Commission's action that amended Section 73.213 be modified to permit any grandfathered short-spaced station to be authorized for facilities that would produce predicted coverage equivalent to either: (1) the maximum predicted coverage that could have been authorized under the old rule; or alternatively, (2) the maximum predicted coverage from a site that is not short-spaced.

6. *Discussion*. Prior to the *Second Report*, Section 73.213 allowed licensees to routinely modify or relocate grandfathered short-spaced stations, even if the potential for interference were increased as a result. In the *Second Report* we affirmed our contention that licensees of grandfathered short-spaced stations have had sufficient time (22 years) to relocate and optimize their facilities under the relatively liberal provisions of the old rule. We found that continuing to allow relocations and modifications that increase the risk of interference is not in the public interest and is counter to our objective of promoting efficiency in the use of the spectrum. We therefore amended the rule to allow only relocations and modifications that will not increase predicted interference. We also reaffirmed and expanded our policy of accepting for consideration agreements between grandfathered short-spaced stations that would permit increases in both facilities.[9]

7. Brown did not present any evidence to demonstrate that any grandfathered short-spaced station other than WBRU has or anticipates a similar problem; that is, operation at an interim location on the effective date of our action. No comments were filed by other grandfathered short- spaced stations in support of Brown's petition. We are not aware of any grandfathered short-spaced station other than WBRU that would be significantly affected by our action in the *Second Report*. Therefore, we must conclude that Brown's situation, if not unique, is rather uncommon.

8. Tailoring Section 73.213, which affects all grandfathered short-spaced stations, to fit circumstances peculiar to one particular grandfathered short-spaced station would not be good public policy.[10] Because Brown's situation with regard to the site for WBRU appears to be an individual problem, any relief that may be necessary

would be more appropriately considered in the context of a request for a waiver of Section 73.213, rather than through any further amendment of that rule.[11]

9. Even if additional grandfathered short-spaced stations were affected in a manner similar to WBRU, we would not amend Section 73.213 of our rules in either of the ways that Brown suggests. The first alternative[12] that Brown offers would, in effect, reinstate the old rule and undermine our purpose in changing the rule in the *Second Report*, namely, to prevent further increases in interference resulting from modifications and relocations of grandfathered short-spaced stations. The other alternative suggested by Brown[13], if made a rule, would be impiemented by licensees largely through the use of directional antennas. As we are currently considering in a broader context the possibility of permitting short-spaced operation through the use of directional antennas,[14] we will not entertain Brown's less comprehensive suggestion here. For all of the foregoing reasons we will deny Brown's petition.

10. *The Hilding Petition.* Eric R. Hilding (Hilding), in his petition, states that Section 73.211, as amended by the *Second Report*, excludes Class A FM stations from "the benefit of certain reference distance considerations", and claims that this exclusion prevents Class A FM stations from utilizing relatively high (and therefore desirable) antenna locations. To illustrate this, Hilding provides a hypothetical account of a Class A FM station with access to a site that would provide an antenna HAAT of 639.5 meters. He states that the hypothetical Class A station would need to operate with an ERP of 65 watts at this site in order to provide full Class A coverage, but that "such operation would *not* be permitted pursuant to Section 73.211(a)(3)."[15] Hilding concludes that the hypothetical Class A station could not use the site.

11. For relief, Hilding requests that the Commission modify its action that amended Section 73.211 by adding another paragraph to that section. The additional paragraph Hilding provides would expressly permit any Class A station, regardless of its HAAT, to operate with less than 100 watts, provided that the resulting reference distance equals or exceeds that of a Class A station operating with minimum facilities.[16] Hilding further requests that a reference to this additional paragraph be added to paragraph 73.211(b)(2).

12. *Discussion.* Section 73.211 does not preclude a Class A FM station from using any desired antenna site, regardless of the elevation or the resulting antenna HAAT.[17] Therefore, the hypothetical station in Hilding's example would not be prevented by Section 73.211 from using the 639.5 meter HAAT antenna site.

13. Hilding does raise a good point, however. Section 73.211 as it now stands does treat Class A stations differently than stations of the other classes in this respect -- Class A stations at very high antenna sites must provide the full maximum Class A coverage,[18] whereas Class B1, B, C2, C1 and C stations need only provide more coverage than the full maximum coverage of the *next lower class.*[19] In the particular paragraph (§73.211(a)(3)) that states this, Class A stations were excluded because there is no lower class to establish a minimum coverage requirement for Class A stations.

14. We find that Hilding's suggestion to use Class A minimum facilities as the lower boundary for Class A coverage is reasonable and appropriate. Accordingly, we will amend Section 73.211 to permit any Class A station to have an ERP less than 100 watts, provided that the reference distance equals or exceeds 6 kilometers. *See* footnote 16 *supra*. Rather than adding a new paragraph, we are appending the appropriate language to paragraph 73.211(a)(3). *See* Appendix.

OTHER MATTERS

15. The rule amendment contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and it will not increase or decrease burden hours imposed on the public.

16. Because the rule amendment we are adopting herein is a substantive rule which grants an exemption and relieves a restriction, we are designating that it shall become effective immediately upon publication in the Federal Register.[20] Applications pending or received on or after September 25, 1987 (the release date of the *Second Report)* may be processed in accordance with the newly amended rule.[21]

ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Brown Broadcasting Service, Inc. IS DENIED, and That the Petition for Reconsideration filed by Eric R. Hilding IS GRANTED.

18. IT IS FURTHER ORDERED That Part 73 of the Commission's Rules and Regulations IS AMENDED, as set forth in the Appendix below, effective upon publication in the Federal Register. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III.
Acting Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.211 is amended by revising paragraph (a)(3) to read as follows:

§ 73. 211 Power and antenna height requirements.

(a) * * *

(3) Stations of any class except Class A may have an ERP less than that specified in paragraph (a)(1) of this section, provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section,

exceeds the distance to the class contour for the next lower class. Class A stations may have an ERP less than 100 watts provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, equals or exceeds 6 kilometers.

* * * * *

FOOTNOTES

[1] 2 FCC Rcd 5693 (1987), released September 25, 1987.

[2] 104 FCC 2d 160 (1986).

[3] *Report and Order*, 94 FCC 2d 152 (1983); *recon. granted in part and denied in part*, 97 FCC 2d 279 (1984). The Commission amended the FM broadcasting rules to accommodate more stations by increasing the number of station classes.

[4] 2 FCC Rcd 660 (1987). The Commission amended the rules to permit any class of station to be allotted on 20 channels that were previously reserved for Class A operation. Also, the Commission declined to remove a rule section that provides for the classification of stations by zone based on transmitter location rather than the location of the communityof license.

[5] Grandfathered short-spaced stations are FM stations at locations authorized prior to November 16, 1964 (when the Commission began using the distance-based allotment and assignment method) that did not meet the separation distances required by §73.207 and have remained short- spaced since that time. These stations are allowed to continue to operate at or near their 1964 locations even though these locations do not comply with current interstation distance separation requirements.

[6] The effective date of the *Second Report* was November 9, 1987.

[7] §73.213, as amended, permits modification or relocation of any grandfathered short-spaced station provided that the station's predicted 1 mV/m field strength contour is not extended toward the predicted 1 mV/m field strength contour of any other grandfathered short-spaced station.

[8] WBRU has been operating at this site with an ERP of 20,000 watts for more than 10 years.

[9] If the Commission finds that the public interest would be served by a mutual increase in the facilities of two or more grandfathered short- spaced stations pursuant to the terms of such an agreement, Section 73.213 may be waived to permit the increase. However, this policy does not apply to site relocations. *See Public Notice*, FCC 75-1367, dated December 15, 1975, 57 FCC 2d 1263 (1975); 40 Fed. Reg. 58893, December 19, 1975, codified in §73.4235 of the Commission's rules. *See also Public Notice*, released September 25, 1987, 2 FCC Rcd 5701 (1987), which extended the policy to encompass agreements with grandfathered short- spaced stations on the second and third adjacent channels.

[10] Rules adopted in a generic rule making are of general applicability and do not consider the special circumstances of individual parties. The rule making process contemplates the subsequent consideration and possible grant of rule waivers for good cause shown in specific cases where unique or unusual circumstances obtain, or to remedy unintended hardships occasioned by our rules. *See WAIT Radio v. FCC*, 418 F.C. 2d 1153, 1157 (D.C. Cir. 1969).

[11] Brown has pending an application (BPH871106IU) that requests an increase in power to 50,000 watts and a site relocation. This application was filed three days before the effective date of the *Second Report*, and therefore can be processed in accordance with the old §73.213. If this application is granted, Brown will gain the relief it seeks in the instant petition. If the application is not granted, Brown has the option of requesting, with the appropriate public interest showing, a waiver of the newly amended §73.213. The Commission does not here evaluate or rule on the merits of any future relocation of WBRU. Rather, the Commission's decision in this *Memorandum Opinion and Order* is based primarily on the inappropriateness of amending a rule affecting an entire group of licensees solely in response to the concerns of one licensee in that group.

[12] Under this alternative, grandfathered short-spaced FM stations could be modified or relocated in any way that would produce a predicted contour matching the predicted contour of a short-spaced facility that could have been authorized under the old rule.

[13] The second alternative suggested by Brown is to permit any modification or relocation of a grandfathered short-spaced FM station that would produce a predicted contour that matches the predicted contour of hypothetical facility at a non-short-spaced site. This is essentially the concept of "equivalent protection".

[14] *See Notice of Proposed Rule Making* in MM Docket 87-121 (FCC 88-73, released March 30, 1988). For additional background, *see Notice of Inquiry* in MM Docket 87-121, 2 FCC Rcd 3141 (1987). The Commission has requested comment as to the feasibility of the use of directional antennas to permit short-spaced operation by any FM broadcast station, not just the grandfathered ones affected by §73.213.

[15] Hilding implies (although he does not explicitly state) that paragraph 73.211(a)(3), which was added to the rule in the *Second Report*, prevents Class A stations from reducing power below 100 watts pursuant to paragraph 73.211(b)(2), in effect limiting Class A stations to a maximum HAAT of 525 meters (1722 feet).

[16] The minimum facilities for a Class A FM station are considered to be 100 watts ERP with an antenna HAAT of 30 meters. This combination produces a reference distance of 6 kilometers.

[17] The rules permit operation of a Class A FM broadcast station with any antenna HAAT. However, with an antenna HAAT greater than the Class A reference HAAT (100 meters), the station's ERP must be lower than the 3,000 watt class maximum such that the resulting reference distance does not exceed 24 kilometers. For a HAAT of 639.5 meters, the example Hilding uses, §73.211(b)(2) does indeed limit a Class A station to 65 watts ERP, but such operation is not prohibited by §73.211(a)(3), as Hilding claims.

[18] A reference distance of 24 kilometers constitutes full coverage for a Class A FM broadcast station. As of January 1988, there are 10 Class A stations that have an antenna HAAT greater than 525 meters. Eight of these are providing full coverage. *See* footnote 15 *supra*.

[19] Before the *Second Report*, all FM stations at very high antenna sites were required to provide the full maximum coverage for their class. However, the Commission found it necessary to allow stations the option to provide less than full coverage in order to facilitate classification of FM stations and to provide a continuous range of permissible facilities. *See* paragraph 14 in the *Second Report*.

[20] *See* 5 U.S.C. 553(d).

[21] The restriction removed herein was an unintended effect of the Commission's action in the *Second Report*. Applying the newly amended rule to the processing of applications pending or received on or after the release date of that decision will eliminate any hardship that may have resulted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-114

In the Matter of

Review of Technical and Operational
Regulations of Part 73, Subpart E,
Television Broadcast Stations

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1988; Released: April 29, 1988

By the Commission: Commissioner Dennis issuing a separate statement.

INTRODUCTION

1. The Commission is initiating this proceeding to review technical and operational requirements of Subpart E of Part 73 of the Commission's Rules for television broadcast stations. The intent of this proceeding is to delete such regulations that may be unduly burdensome or outdated, and may no longer be needed. This *Notice of Proposed Rule Making* (*Notice)* considers only the elimination of rules relating to the technical operation of television broadcast facilities. This action continues the Commission's deregulatory review of technical regulations as initiated by General Docket No. 83-114, *A Re-Examination of Technical Regulations*, 99 FCC 2nd 903(1984). As a result of that proceeding, the Commission conducted a series of Rule Making actions in which many of the technical regulations were deleted if they were determined to be prescriptive of outdated or unwarranted specifications.[1] Also, regulations that required stations to meet certain signal quality performance levels were eliminated in favor of allowing competitive marketplace incentives to influence the quality of the signal to the listening and viewing public. However, those regulations which act to control interference among stations have been appropriately maintained. Rules in the following areas are considered in this proceeding:

(1) Separate operation of TV aural and visual transmitters.

(2) Power meter calibration.

(3) Color burst signal requirement.

(4) Antenna radiation pattern limitations.

(5) Equipment installation and safety specifications.

(6) Reference table for conversion of minutes and seconds to decimal parts of a degree.

ISSUES

Separate operation of TV aural and visual transmitters.

2. Television program signal transmission has a picture component and its associated or "integrated" sound, each produced with separate visual and aural transmitters, respectively.[2] However, licensees may also transmit separate non-associated video and audio program signals. This allows for the broadcasting of aural programming with or without visual displays, or visual informational service with or without sound. Such service might include video-only programming of news, weather, time of day, and other reports. Prior to 1980, the separate operation of the audio and video transmitters had been prohibited and was permitted only in certain situations, such as during test pattern transmissions, equipment testing or experimentation, etc. In 1980 the Commission permitted separate audio or video service. At that time, the Commission was concerned that broadcasters might overuse this form of service by augmenting their program day with audio-only or video bulletin board-like informational services in place of normal programming during regular operational hours. Thus, the Commission specified the hours of operation as 12 midnight until 6 A.M. because these were the most common "dark" or unused hours for stations not operating 24 hours per day. [3] Recognizing, however, that many stations sign-on after 6 A.M., particularly some non-commercial educational stations, the Commission permitted these stations to broadcast audio or video informational service for no more than 15 minutes immediately prior to the start of the station's scheduled sign-on.

3. The essence of the Commission's action in 1980 was to allow an additional service to be offered the public at hours where no "regular" television service was presented by the station. However, by specifying the permitted time-of-day and the 15-minute limit for stations signing on later than 6 A.M., the Commission restricted the broadcasters' flexibility of using the informational service during the course of regular broadcast hours. We now believe that the public interest would be better served by allowing the licensee maximum flexibility to establish the duration and time of day that is most appropriate for transmitting separate audio or video services. For instance, there are some communities where certain news or special interest reports, *e. g.*, farm crops index reports, may be of significant public benefit at certain times of the regular broadcast day. Rather than broadcasting such information with an on-air announcer, stations could elect to transmit these reports more cost effectively via a video text bulletin board-like service. In general, we believe that competitive pressures from competing stations and from viewers will create incentives for broadcasters to decide whether to transmit regular integrated sound and video signal programming or to transmit non-associated audio and video informational services, depending upon the interest and desires of their viewers. In our analysis we find no basis for not allowing licensees to make this judgment within the competitive limits of their individual broadcast market areas. Therefore, we propose to amend Rule Section 73.653 to eliminate all time restrictions for the transmission of video informational services.

Power meter calibration.

4. In operating a television broadcast station, a licensee must have the capability of determining and maintaining the appropriate level of authorized transmitter power at

all times. In using the "direct method" for determining the station's visual power level under Section 73.663(b)(3), a transmission line meter that must be calibrated at least once every six months should be used.[4] The Rule also states however, that such meter calibrations should be done as often as may be necessary to insure compliance with the power limitations.

5. The Commission believes that the 6-month calibration requirement may be excessive for some stations and may be inadequate for others, depending on the age of a station's equipment. For example, the newer state-of-the-art test equipment maintains its accuracy over long periods and does not require as frequent recalibration. For stations using such equipment, a 6-month calibration requirement may be excessive and unwarranted. Even for stations using older test equipment, which may need more frequent calibration, the requirement also may not be necessary in view of the overriding requirement to perform calibrations as often as necessary to ensure compliance with the power limitation. In view of this overriding requirement, we believe that we can rely on the broadcaster to ensure proper technical operation of its station. When this is insufficient, Commission enforcement of the necessary calibrations is available. Therefore, we propose to delete the requirement in Section 73.663(b)(3) that the transmission line meter be calibrated at intervals not to exceed 6 months.[5]

Color burst signal requirement.

6. The TV transmission standards in our Rules describe the specific characteristics of the broadcast television signal to be transmitted within the assigned 6 MHz channel. Among this body of standards, Section 73.682(a)(9)(ii) states that color transmission shall comply with the synchronizing waveform specifications in Figure 6 of Section 73.699. Note 8 of Figure 6 specifies that "color burst" signals are to be omitted during monochrome (black and white) transmission.[6] In 1976, the Commission reaffirmed and clarified the application of this requirement.[7] Since that time, however, broadcasters and cablecasters have found certain video tape processing equipment to have operational disadvantages in omitting the color burst signal when transmitting a black-and-white video signal. Modern video equipment technology now utilizes the color burst signal for more than its original purpose of transmitting color reference information. The popular types of video processing equipment, used almost universally, rely on the color burst for timing and synchronization information to correct video signal stability or timing errors. And thus, some units are designed so as to require the color burst signal for proper operation, *e. g.*, in the video tape editing process. Consequently, some broadcasters on some occasions have requested and received waivers of this requirement.[8]

7. The requirement to omit the color burst signal was adopted in 1953 when color television receivers had relatively unsophisticated circuitry (compared to today's state-of-the-art receiver), which sometimes resulted in an inferior picture when receiving a black-and-white transmission containing color burst signals.[9] If not working properly, the color circuitry in these older model receivers was sometimes activated during the reception of a black-and-white transmission containing color burst signals. The activated circuits would cause picture degradation in the form of "colored snow or confetti" (visual random noise), or other distortion effects. It is our understanding that modern receiver design has minimized this problem, and, that, other than on older model sets (prior 1980 vintage), it only occurs on those sets in fringe areas receiving weak signals.[10] Even so, some of the current literature indicates that the color burst signal level must be significantly reduced or suppressed, so that the "color killer" circuitry in today's receivers might be activated to cut off the color circuitry during the reception of black-and-white transmissions.[11] That observation notwithstanding, it has nevertheless been suggested that current technology has largely obviated the need for the color burst omission standard, as referenced above, and that compliance with the requirement has become increasingly burdensome.

8. It also has been suggested that the current rule creates production problems and expenses in corrective video editing. For instance, the design of some videotape machines requires that a color burst signal, if absent, first be added to a program tape before the machine will be able to properly edit the tape. Then, in order to broadcast that material in accordance with the current rule, the inserted color burst signal must be deleted after editing is completed. Thus, two additional steps and, in most cases, an additional piece of equipment are required to comply with the color burst omission rule. In addition, this two-step process can degrade the quality of the picture as a result of unavoidable timing signal errors.

9. It is also noted that broadcast programs with no color burst can cause serious video signal timing and synchronization problems in cable television retransmissions. The cable television industry in retransmitting broadcast programming is using more frequently equipment known as frame synchronizers that rely on the presence of color burst for timing. If not properly adjusted via the color burst signal, these frame sychronizers will sometimes treat a transmission without such color burst as defective. The apparent result to the cable operator is the functional equivalent of a transmitter failure at the broadcast station. This is an undesirable condition for those broadcasters that are providing their signal for cable TV distribution.

10. We note that the color burst omission requirement is a quality control regulation and does not pertain to adjacent or co-channel interference control. Thus, the elimination of this rule would be consistent with the Commission's regulatory policy that decisions concerning picture quality should properly be left to the broadcast licensee.[12] Although elimination of the requirement may lead to some measure of picture degradation for some viewers, particularly in older model receivers or in areas where reception is marginal, we believe that in instances in which the broadcaster chooses to retain the color burst signal during black-and-white programming, and this results in audience complaints, the broadcaster will be responsive to its audience in the station's best interest. Thus, we are confident that the broadcaster would strike what it believes is the most appropriate balance between the consumers' demands for the highest quality signal and the demands to operate its video tape processing and other equipment in the most efficient manner. Therefore, we propose to delete the requirement of Note 8 of Figure 6 in Section 73.699 that the color burst signal be omitted during the transmission of monochrome programming.[13]

Antenna radiation pattern limitations.

11. Depending on the location of a television station transmitter, use of a directional antenna system may be more beneficial to the station and to viewers, than a

nondirectional antenna. While not authorized routinely, directional antennas may be used for the purpose of improving service upon an appropriate showing of need. *See* Rule Section 73.685 (e).

12. When television broadcasters use directional antenna systems, one of our regulations restricts the ratio of the maximum radiated power at any point in the horizontal radiation pattern to the minimum radiated power at any other point in that pattern. This regulation was intended to prevent the use of antennas whose patterns had areas of extreme suppression (or nulls), and were unpredictable and unstable. Use of such antennas would have led to ghosting problems within the null areas. Rule Section 73.685(e) specifies that directional antenna horizontal radiation patterns for stations operating on VHF channels must not have nulls that exceed a 10 dB maximum-to-minimum ratio. It also specifies that UHF stations operating with more than 1.0 kW of video transmitter output power must not employ a directional antenna whose radiation pattern has nulls that exceed 15 dB. (UHF stations operating with 1 kW or less are not so limited.) The Commission adopted these limits because it concluded that nulls greater than -10 dB and -15 dB for VHF and UHF, respectively, may not be practicable because of signal reflections from the strong main lobe into the weaker null areas.[14] On many occasions, however, broadcasters have requested waivers to exceed the specified maximum-to-minimum ratio for their radiation patterns. In several instances, the Commission has granted such waiver requests. For example, broadcasters have been allowed to adjust their signal radiation patterns exceeding these limits so as not to waste power over large bodies of water within their coverage areas. In other instances, we have granted waivers to avoid excessive signal radiation toward the face of a hill or mountain, which could reflect the signal and cause picture "ghosting" image degradation. We are not aware of significant problems as a result of our granting such waivers.

13. We now believe the maximum-to-minimum requirement can be eliminated. The state-of-the-art in antenna design has progressed since the time when the current limits were originally proposed in a *Notice* on July 11, 1949 (*see* para. 215 in the *Sixth Report and Order).* By now, advances in antenna design have provided for increased accuracy in predicting and attaining the desired suppression in directional antennas. Therefore, we propose to delete the maximum-to-minimum ratio limitations described in Rule Section 73.685(e).[15]

Equipment installation safety specification

14. Rule Sections 73.687(d),(e),(f), and (h) contain requirements for the construction and installation of transmission systems and studio equipment, and other safety procedures. The Commission's safety requirements were written years ago when many broadcasters designed and built their own facilities. Today, nearly all broadcasters acquire their transmission system equipment from manufacturers that must meet the safety requirements such as the National Electrical Code imposed by other regulatory agencies. In addition, much of this equipment is tested for safety by independent laboratories, *e. g.*, Underwriters Laboratories (UL). Moreover, we believe that broadcasters have strong incentives to install safe equipment in order to minimize the possibility of any harm to their employees.

15. Section 73.687 also contains specifications for studio equipment and the electrical properties of the transmitter. Many of these requirements are also no longer necessary for the reasons mentioned above. Also, these installation and safety specifications do not pertain to the prevention of, or limits on, adjacent and co-channel interference, which are of paramount Commission concern. Such specifications are analogous to those eliminated from the Rules in similar proceedings for AM and FM radio stations.[16] It is our view that these requirements pertaining to equipment installation and safety are redundant with respect to other state or federal requirements.[17] Thus, we conclude that the installation and safety requirements in Sections 73.687(d),(e), (f), and (h) may be unwarranted; we, therefore, propose their removal.

Reference table of minutes and seconds converted to decimal parts of a degree.

16. Table I of Rule Section 73.698 contains conversions for minutes-to-decimal and seconds-to-decimal parts of a degree. These values may be used in the calculation of geographical distance separations between television channel assignment locations. Such conversion factors were established in the Rules to provide the means of consistent and accurate calculations long before the advent and widespread availability of electronic calculators and computers. At that time, approximations and estimations were usually made in determining such values using slide rules or some other manual method. On occasion, such calculations yielded imprecise and inconsistent results. However, since electronic calculators and computers are universally used today for calculating coordinate distance separations, with increased accuracy and speed of computation, Table I is no longer needed. Therefore, we propose to delete Table I of Section 73.698 from the Rules.[18]

CONCLUSION

17. In this proceeding, we have reviewed a number of rules that we believe to be unnecessary, burdensome, and anachronistic. We encourage all interested parties to comment not only on the specific proposals detailed above but also to comment on other related technical issues which are within the scope of this proceeding.

18. Authority for this proposed rule making is contained in Sections 1.3. 4(i) and (j), 303 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 20, 1988,** and reply comments on or before **July 5, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted.

19. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda,

and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

20. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, must provide, on the day of the oral presentation, a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

21. As required by Section 603 of the Regulatory Flexibility Act, the Commission had prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 5 U.S.C. Section 601 et seq. (1982).

22. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

23. To file formally in this proceeding, participants must file an original five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications, Commission. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

24. For further information on this proceeding, contact Bernard Gorden, Mass Media Bureau. (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for action

The reason for this review is to determine the relevance of current Commission rules concerning television broadcast transmission quality in light of expanding marketplace competition and to consider whether these rules should be revised or eliminated. This review also considers the elimination of television broadcast facility safety rules which may be enforced more appropriately by other agencies.

II. The objective

This action is proposed to delete unnecessary or outdated rules and policies and allow television broadcast licensees to operate their stations with increased flexibility and less burdensome technical regulations.

III. Legal basis

The legal basis for the Commission's engaging in rule making is contained in Sections 4(i) and (j) and 303(r) of the Communications Act of 1934, as amended.

IV. Description, potential impact, and number of small entities affected

There are 1,005 commercial television stations, and 317 noncommercial television stations in the United States. All of these stations should benefit from this proposal by being allowed increased flexibility and being relieved of burdensome regulations. We expect no negative impact to these stations, small entities or large, as we are not mandating any new requirements or showings. Interference should not increase as a result.

V. Recording, Recordkeeping, and Other Compliance Requirements

There is no additional impact.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rules

There is no overlap, duplication, or conflict.

VII. Any Significant Alternatives Minimizing Impact On Small Entities And Consistent With Stated Objective

There are no alternatives available.

APPENDIX B

Part 73 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 73 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.208 is proposed to be amended by removing paragraphs (c)(1)(i) and (ii) and revising paragraph (c)(1) to read as follows:

§ 73. 208 Reference points and distance computations.

* * * * *

(c) ***

(1) Convert the latitudes and longitudes of each reference point from degree-minute-second format to degree-decimal format by dividing minutes by 60 and seconds by 3600, then adding the results to degrees.

* * * * *

3. Section 73.653 is proposed to be revised to read as follows:

§ 73. 653 Operation of TV aural and visual transmitters.

(a) The aural and visual transmitters may be operated separately to present different or unrelated program material for the following purposes:

(1) Emergency fills due to either visual or aural equipment failures leaving the licensees with only the audio or video programming to announce the equipment failures to the audience;

(2) Equipment tests or experimentation pursuant to §73.1510 (Experimental authorizations) and §73.1520 (Operation for tests and maintenance).

(3) To present visual transmissions of a test pattern, still pictures or slides with aural transmission consisting of a single tone or series of variable tones, a presentation of the upcoming program schedule, aural news broadcasts, or music.

4. Section 73.663 is proposed to be amended by revising paragraph (b)(3) to read as follows:

§ 73. 663 Determining operating power.

* * * * *

(b) ***

(3) The meter must be calibrated with the transmitter operating at 80%, 100%, and 110% of the authorized power as often as may be necessary to insure compliance with the requirements of this paragraph. In cases where the transmitter is incapable of operating at 110% of the authorized power output, the calibration may be made at a power output between 100% and 110% of the authorized power output. However, where this is done, the output meter must be marked at the point of calibration of maximum power output, and the station will be deemed to be in violation of this rule if that power is exceeded. The upper and lower limits of permissible power deviation as determined by the prescribed calibration, must be shown upon the meter either by means of adjustable red markers incorporated in the meter or by red marks placed upon the meter scale or glass face. These markings must be checked and changed, if necessary, each time the meter is calibrated.

5. Section 73.685 is proposed to be amended by revising paragraph (e) to read as follows:

§ 73. 685 Transmitter location and antenna system.

* * * * *

(e) An antenna designed or altered to produce a noncircular radiation pattern in the horizontal plane is considered to be a directional antenna. Antennas purposely installed in such a manner as to result in the mechanical beam tilting of the major vertical radiation lobe are included in this category. Directional antennas may be employed for the purpose of improving service upon an appropriate showing of need.

6. Section 73.687, Transmission system requirements, is proposed to be amended by removing paragraphs (d), (e), (f) and (h), and redesignating paragraph (g) as paragaph (d).

7. Section 73.698, Tables, is proposed to be amended by removing Table I.

8. Section 73.699, Figure 6, is proposed to be amended by removing Note 8, and redesignating Notes 9 through 19 as Notes 8 through 18 respectively.

FOOTNOTES

[1] The Commission has earlier adopted the following similar actions in review of technical facilities and operational requirements: *Review of Technical and Operational Regulation of FM Broadcast Stations, Report & Order* in MM Docket No. 85-325, 51 FR 17027, May 8, 1986; *Review of Technical and Operational Regulations of AM Broadcast Stations, Report & Order* in MM Docket No. 85-125, 51 FR 2704, January 21, 1986; *Review of Technical and Operational Regulations of Cable Television Systems, Report & Order* in MM Docket No. 85-38, 50 FR 52462, December 24, 1985.

[2] "Integrated sound" pertains to the simultaneous transmission of video and aural signals representing a displayed scene and its related sound.

[3] *See* §73.653, and *Report & Order*, BC Docket No. 80-10, 45 FR 63857, September 26, 1980, concerning *Operation of Visual and Aural Transmitters of TV Stations*.

[4] The "direct method" of power determination for a television visual transmitter involves the measurement of power by direct measurement of the RF (radio frequency) output terminals of the transmitter.

[5] The Commission deleted a similar mandatory 6-month equipment calibration requirement from the FM broadcasting rules for similar reasons. *See Report and Order*, BC Docket No. 82-537, 48 FR 38473, August 24, 1983, concerning *Operating and maintenance logs for broadcast and broadcast auxiliary stations*.

[6] The "color burst" is a short series of 8 to 11 cycles of the color subcarrier frequency (3.576545 MHz). For color TV transmission, it is superimposed on a portion of each horizontal blanking signal. It is used to synchronize the receiver's color subcarrier oscillator with that of the transmitter so that the colors will be properly decoded by the receiver.

[7] See Omission of the color burst, *Memorandum Opinion and Order*, 58 FCC 2d 385, adopted March 9, 1976. The Commission stated in paragraph 4, ". By its terms, Section 73.699, Figure 6, Note 8, requires that the color burst be omitted when any monochrome program material is broadcast. Because some receivers are slow to 'lock in' when the color burst is restored following a monochrome transmission, it is the Commission's policy that the color subcarrier need not be deleted during transmission of limited monochrome segments within a program which is fundamentally designed and intended to be broadcast in color. In no event should the color burst be transmitted during a program which is basically monochrome, such as a full length black and white motion picture, except during the actual time when it is desired to transmit local inserts, station identifications, or commercials in color."

[8] On August 31, 1987, the Commission received a request by the Public Broadcasting Service (PBS) and the National Association of Public Television Stations (NAPTS) for a blanket waiver of the rules requiring omission of the color burst reference signal during monochrome television transmissions for all noncommercial educational stations. PBS/NAPTS further suggested that the Commission may wish to consider whether this requirement should be applied to any broadcaster, and consider issuing a declaratory order that eliminates the requirement for all broadcasters. Thus, in lieu of granting a blanket waiver as requested by PBS/NAPTS or issuing a declaratory order, we will address their concerns in this proceeding, thereby rendering their request moot.

[9] See Report And Order, Rules Governing Color Television Transmission, in Docket No. 10637, 18 FR 8649, December 23, 1953.

[10] The Electronic Industries Association (EIA) also has informally reported that, generally, receiver manufacturers prefer that the color burst omission requirement remain in the rules because it is an interoperability standard. That is, it is a standard to which manufacturers can design and build universal domestic receivers. They indicate that color receivers are not necessarily designed to be immune to monochrome picture degradation if the color burst signal is not omitted or at least significantly suppressed. On the other hand, the EIA and Association of Maximum Service Telecasters, Inc. (MST) have informally reported that broadcasters generally prefer the option of not omitting the color burst signal.

[11] For example, Television Engineering Handbook by K.B. Benson, 1985, states that "Most receivers . . . cut off the chroma channel transmission when the received burst level goes below approximately 5 to 7 percent." This may suggest that a suppression of the color burst to a level of approximately 6 percent of its signal may accomplish what a signal omission would. We solicit comments on the appropriateness of suppression to 6 percent of the level of the color burst signal during monchrome transmissions. Comments are also requested as to whether such suppression would be sufficient to accommodate the signalling functions of the video tape processing equipment discussed in paragraph 9.

[12] See A Re-examination of Technical Regulations, *supra*. While the Rules have generally regulated the technical quality of the broadcast transmission signal, the Commission noted in that proceeding that it had never regulated the technical quality of the broadcast program signal. The Commission further recognized that the competition among broadcasters and certain other service providers was sufficient to regulate picture and sound quality. It noted that competitive market forces would create incentives for television stations to produce pictures and sound of a technical quality acceptable to viewers. The fear of losing audience to other stations would create strong incentives for stations to maintain the technical quality of their sound and video in the absence of any government regulation.

[13] We also seek comments as to what percentage of television receivers fall in the "older set" category and what percentage of the audience is located in areas with marginal reception. However, as suggested above, if the received picture signal is degraded as a result of continued color burst signal during the transmission of black and white programming, it should be reported to, and resolved by the particular broadcast station transmitting that signal, without Commission intervention.

[14] Radio wave signal reflections in television systems can cause ghost images (picture degradation) on the receiver screen. See Engineering Standards concerning Television Broadcast Service, Sixth Report and Order in Docket No. 9175, 17 FR 3905, May 2, 1952 and Expanded Use of UHF Television channels, Second Report and Order in Docket No. 14229, 28 FR 3394, April 6, 1963.

[15] While proposing to delete the maximum-to-minimum antenna radiation restrictions, we also seek comments as to whether these restrictions should be relaxed rather than eliminated. If so, we seek further comments as to what level of radiation suppression should be permitted.

[16] See Reports and Order in MM Docket Numbers 85-125, and 85-325, *supra* note 1.

[17] These functions may be performed more appropriately by the Department of Labor's Occupational Safety and Health Administration (OSHA) or by local agencies. For instance, OSHA's safety standards for high voltage equipment are detailed in Title 29, Part 1910 of the Code of Federal Regulations.

[18] Section 73.208(c)(1) refers to Table I of 73.698 for calculating FM assignment distance separations. For the same reasons as given above, the conversion data in Table I is not needed for FM assignment distance calculations. Consequently, we also propose that the reference in Section 73.208(c)(1) to Table I in 73.698 be deleted.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Review of Technical and Operational Regulations of Part 73, Subpart E, Television Broadcast Stations

The proposal to eliminate rules (Sections 73.687(d), (e), (f) and (h)) related to safety procedures and requirements for constructing and installing transmission systems and studio equipment troubles me. The commenters should focus upon the extent to which other agency regulations, state or federal, actually address the safety concerns our rules currently contemplate. Are these rules, in fact, "redundant" as the Notice of Proposed Rulemaking states, or do they provide necessary, additional safety guidelines? If these rules are outdated because they were written "years ago",[1] should we update them rather than totally eliminate them?

FOOTNOTE FOR STATEMENT

[1] *Notice of Proposed Rulemaking* at paragraph 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC. — File No. I-T-C-88-007

Application for authority to resell services of FTC Communications to provide switched voice services from the United States to France.

CABLE & WIRELESS COMMUNICATIONS, INC. — File No. I-T-C-88-008

Application for authority to resell services of TRT International, Inc. to provide switched voice from the United States to Australia and India.

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1988; Released: April 29, 1988

By the Acting Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications of Cable & Wireless Communications, Inc. (C&W) for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell, pursuant to contract, the services of FTC Communications (FTCC) and TRT International, Inc. (TRT) in order to provide international switched voice communications between the U.S. and certain overseas points. The applications were placed on the Commission's public notice. No petitions are pending against these applications.[1]

2. In application File No. I-T-C-88-007, C&W seeks authority to resell, pursuant to contractural arrangement, the switched voice services of FTCC to provide service between the U.S. and France. In application File No. I-T-C-88-008 C&W requests for authority to resell the services of TRT for the purpose of providing switched voice communications between the U.S. and Australia and India. The Act permits carriers to arrange inter-carrier dealings by contract rather than tariff.[2] The Commission's *Competitve Carrier International* [3] decision does not place any restrictions on acquisition of facilities by contract by dominant, foreign-owned carriers such as C&W. We have reviewed the C&W/FTCC and C&W/TRT contracts and have found them to be consistent with others we have approved in the past.

3. C&W is already authorized to provide international switched voice service between the United States and various international points[4] in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[5] We find that the market will support additional carriers and that the added competition will be in the public interest.[6]

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-007 IS GRANTED and C&W is authorized to resell, pursuant to contractural arrangement, the services of FTCC to provide international switched voice service between the U.S. and France.

5. IT IS FURTHER ORDERED that application File No. I-T-C-88-008 IS GRANTED and C&W is authorized to resell, pursuant to contractural arrangement, the services of TRT to provide international switched voice service between the United States and Australia and India.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Pan American Satellite Corporation (PAS) filed petitions to deny C&W applications I-T-C-88-007 and I-T-C-88-008 and an Application for Review of the grant of C&W application I-T-C-87-168. These petitions were withdrawn by letter dated April 6, 1988.

[2] 47 U.S.C. §§ 211(a), 201(b). *See also* Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1276-8 (3rd Cir. 1974), *cert. denied* 422 U.S. 1026 (1975), *reh' g denied* 423 U.S. 886 (1975).

[3] International Carrier Policies, 102 FCC 2d 812, 842-3 (1985); *aff' d* on recon., CC Docket No. 85-107, FCC 86-339 (released August 7, 1986).

[4] See Cable & Wireless Communications, Inc., File No. I-T-C-87-004, DA 87-148 (released February 20, 1987).

[5] See cases cited in Teltec Saving Communications Co., Mimeo No. 3548, released April 4, 1986, n. 2.

[6] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 F.C.C. 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-88-083

Application for authority to acquire and operate facilities for service to Chile

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 19, 1988; Released: May 2, 1988

By the Acting Chief, International Facilities Division:

1. The captioned application, filed on February 29, 1988 by MCI Telecommunications Corporation (MCI), requests authority to lease and operate satellite and connecting facilities for direct service to Chile. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Chile by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-083 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 18 voice-grade satellite circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Chile furnished by MCI's correspondent in Chile;

b. lease from AT&T and operate 18 voice-grade circuits in the east coast earth station;

c. lease and operate 18 voice-grade circuits between the east coast earth station and MCI's West Orange, New Jersey office; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Chile and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Chile, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ERRATUM

Released: May 2, 1988

On March 11, 1988, the Common Carrier Bureau of the Federal Communications Commission released a letter (DA 88-250) to counsel for Lufkin Telephone Exchange, Inc., interpreting and clarifying certain accounting and separations procedures as set forth in Parts 32 and 36 of the Commission's Rules. In the second and fourth paragraphs of that letter all references to Account 6621 should be changed to read Account 6623.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-499

In the Matter of

Revision of Section 73.3527(a)(7)
Relating to the Issues-Programs List
for Public Broadcasting Licensees

ERRATUM

Released: May 2, 1988

On March 4, 1988, the Commission released a Report and Order (FCC 88-52) in the captioned proceeding. This document corrects the effective date to read **May 31, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Part 73, Subpart G
of the rules concerning the
Emergency Broadcast System (EBS)

ERRATUM

Released: May 2, 1988

On February 18, 1988, the Commission released an Order (FCC 88-39) in the captioned proceeding. This document corrects the effective date to read **May 31, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-182

In re Applications of

JAY DAUGHERTY, DAVID FRANTZE, DOUGLAS LINDER, STEPHEN MARTIN, ROGER POTTER (hereafter Daugherty)	File No. BPH-870611MA
IRVIN DAVIS (hereafter Davis)	File No. BPH-870615MF
DR. IRENE HICKMAN (hereafter Hickman)	File No. BPH-870615MS
NORTHERN MISSOURI CHRISTIAN BROADCASTING, INC. (hereafter Northern)	File No. BPH-870615MX

For Construction Permit
for a New FM Station
in Kirksville, Missouri
Channel 300C1 (107.9 MHz)

HEARING DESIGNATION ORDER

Adopted: April 13, 1988; Released: May 2, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Davis.* Mr. Davis is "majority stockholder, President and a director of Admiral Broadcasting Corporation, the licensee of KTUF (FM), Kirksville, Missouri." The predicted 1 mV/m contour of KTUF and the proposed Kirksville facility would overlap in violation of Section 73.3555(a)(1) of the Rules. He has indicated that, in the event of grant of the instant application, he "will divest himself of his interest in and connection with" KTUF. Accordingly, in the event of grant of his application, Mr. Davis will be ordered to divest himself of all interests in and sever all connections with KTUF(FM) prior to the commencement of program test authority.

3. Davis petitioned for leave to amend his application on March 4, 1988, six months after the last date for filing amendments as of right. Davis's amendment reports a significant change in information furnished to the Commission and, pursuant to Section 1.65 of the Rules, is accepted for filing. However, Davis may not improve his comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from this amendment will be disallowed.

4. *Hickman.* An engineering study reveals a discrepancy between the 171 meters listed for the antenna height above average terrain (HAAT) in Section V-B/Item 7(b)(3) and the 163 meters HAAT calculated from the average of the eight radials listed in Section V-B/Item 19. This discrepancy does not affect the acceptability of Hickman's application since the use of either value for the antenna height above average terrain does not result in any violation of our technical acceptance rules. Consequently, Hickman will be required to amend to correct the HAAT value in Section V-B/Item 7(b)(3).

5. In addition, study indicates that the applicant has specified erroneous values to the 3.16 mV/m and 1mV/m contours in Section V-B/Item 19. The difference between the values determined by the Commission and those supplied by the applicant is approximately 15%. This deficiency, however, does not adversely affect the applicant's city coverage requirement using either value. Hickman is required to provide corrected contour data, a new contour map, and new area and population data, in addition to the corrected HAAT, to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Northern.* Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Northern would constitute a hazard to air navigation, an issue thereto will be included and the FAA made a party to the proceeding.

7. Other *matters.* The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file Section VI of FCC Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although Daugherty and Davis have filed such statements, each is deficient. Daugherty has not listed any clearly defined female and minority organizations it proposes to use to encourage the referral of qualified minority and female job applicants. Further, it has not listed a specific employment service it proposes to utilize for the referral of job candidates without regard to their race, color, religion, national origin or sex. Finally, Daugherty has not provided a signature of certification of the statements made in its model EEO program. Davis has failed to list any clearly defined minority organization for the recruitment of qualified job applicants. Accordingly, each will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Area and Populations.* Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Northern would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That, in the event of grant of his application, Davis must divest himself of all interest in and sever all connections with FM Station KTUF (Kirksville, Missouri) prior to the commencement of program test authority.

12. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Davis IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That Hickman shall submit an amendment of her response to Section V-B/Item 7(b)(3) to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That Daugherty and Davis shall submit amendments to their model EEO programs in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 23, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-94

In the Matter of

Amendment of Section 73.202(b), RM-5584
Table of Allotments,
FM Broadcast Stations.
(Mesquite, Nevada)

ERRATUM

Released: May 2, 1988

On April 1, 1988, the Commission's Mass Media Bureau released a Memorandum Opinion & Order (DA 88-339) in the captioned proceeding. This document corrects the effective date of the action taken to read **May 16, 1988.** In addition, the dates upon which the window period for filing applications will open and close are corrected to read **May 17, 1988** and **June 15, 1988** respectively.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-442

In the Matter of

Amendment of Section 73.202(b),	RM-4999
Table of Allotments,	RM-5069
FM Broadcast Stations.	RM-5199
(Brenham, Round Rock, Austin,	RM-5397
Caldwell, Belton, Killeen,	RM-5420
Brownwood, West Lake Hills and	RM-5497
Temple[1], Texas)	RM-5498
	RM-5722

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 30, 1988; Released: May 2, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 1 FCC Rcd 967 (1986), soliciting comments on seven optional proposals for the use of Channels 290 and 291 in the above captioned Texas communities. The proposals were: (1) the substitution of Channel 291C2 for Channel 292A at Brenham and modification of license for Station KWHI(FM), at the request of Tom S. Whitehead (Whitehead) (RM-4999); (2) the allotment of Channel 290C2 to Round Rock, at the request of James Duff McClish, Sr. (McClish) (RM-5069); (3) the allotment of Channel 290C1 to Round Rock, at the request of Round Rock Radio Group (R.R. Radio) (RM-5498); (4) the allotment of Channel 290C1 to Austin, at the request of Grass Roots Radio (Grass Roots) (RM-5199); (5) the allotment of Channel 290A to Caldwell, at the request of Call FM Radio (Call FM) (RM-5397); (6) the substitution of Channel 290C1 for 292A at Belton and the modification of license of Station KTQN-FM, at the request of Heart of Texas Communications, Ltd. (Heart of Texas) (RM-5497); and (7) the allotment of Channel 290C1 to West Lake Hills, at the request of Alvin O. Kriegel, Jr. (Kriegel) (RM-5420).

2. In response to the *Notice*, comments[2] were filed by Whitehead, Grass Roots, Heart of Texas and R.R. Radio, each reaffirming an interest in pursuing their respective proposals. Additional comments were filed by Michael Oppenheimer (Oppenheimer); Ixoye Productions, Inc. (Ixoye), licensee of noncommercial educational Station KNLE-FM, Round Rock, San Jacinto Broadcasting Corporation (San Jacinto) and David K. Bamberger (Bamberger). KTEM Radio, Inc. (KTEM), licensee of Station KPLE(FM), Channel 285A, Temple, filed comments and a counterproposal seeking the substitution of either Channel 282 (C1 or C2) or Channel 284C2 for Channel 285A at Temple. [3] Whitehead, Grass Roots, R.R. Radio, San Jacinto and KTEM each filed reply comments.[4]

BACKGROUND

3. In the *Notice*, we set forth seven optional proposals which were either mutually exclusive or in some manner related:

City	Channel No. Present	Proposed
Option I		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A, *290C1*
Option II		
Brenham, Texas	292A	*291C2*
Round Rock, Texas	---	*290C2*
Option III		
Austin, Texas	229, 238, 252A 264, 272A	229, 238, 252A, 264, 272A, *290C1* *(site restriction 44.9 km west)*
Brenham, Texas	292A	*291C2*
Option IV		
Brenham, Texas	292A	*291C2*
Round Rock, Texas	---	*290C1* *(site restriction 47.0 km west)*
Option V		
Caldwell, Texas	---	*290A*
Option VI		
West Lake Hills, Texas	---	*290C1*
Option VII		
Belton, Texas	292A	*290C1*
Brownwood, Texas	257A, 268, 281	257A, 268, *281C1*
Killeen, Texas	222A, 227, 288A	222A, 227, *282A*

Option I - proposed the allotment of Channel 290C1 to Austin, as that community's sixth FM service, without the imposition of a site restriction. This option would preclude the proposals at Caldwell, Round Rock, West Lake Hills, Belton and Brenham. *Option II* - proposed the allotment of Channel 291C2 as a substitute for Channel 292A at Brenham and the allotment of Channel 290C2 to Round Rock, providing a first wide coverage area FM station and a first local FM service, respectively. Caldwell, West Lake Hills, Belton and Austin would be precluded by this option. *Option III* - proposed the upgrade at Brenham (291C2 for 292A) and the allotment of Channel 290C1 to Austin, with a site restriction of 44.9 km west of Austin. Because of the degree of site restriction, parties were requested to provide information as to the availability of a site which would provide a city- grade signal to the city. This option would preclude the proposals at Caldwell, Round Rock, West Lake Hills and Belton. *Option IV* -

proposed the upgrade at Brenham (291C2 for 292A) and the allotment of Channel 290C1 to Round Rock. The Class C1 channel at Round Rock would require a site restriction of 47.0 km west of the city. Due to the substantial site restriction, interested parties were required to demonstrate that a site was available that will meet the spacing requirements and provide a city-grade signal over Round Rock. This option would preclude proposals at Caldwell, Round Rock, West Lake Hills, Belton and Brenham. *Option V* - proposed the allotment of Channel 290A to Caldwell, as that community's first local FM service.[5] This option precludes Austin, Belton, Brenham, Round Rock and West Lake Hills. *Option VI* - proposed the allotment of Channel 290C1 to West Lake Hills, as that community's first local FM service. Preclusion would occur at Austin, Belton, Brenham, Round Rock and Caldwell. *Option VII* - proposed the substitution of Channel 290C1 for Channel 292A at Belton, as a first wide coverage area FM service. In order to accomplish this upgrade a substitution must be made at Killeen, Texas, Channel 282A for Channel 288A.[6] This proposal would preclude the Brenham, Round Rock, Austin and Caldwell proposals.

COUNTERPROPOSAL

4. *TEMPLE, TEXAS* - (population 42,483).[7] KTEM requested the substitution of either Channel 282 (C1 or C2) or Channel 284C2 for Channel 285A at Temple, as that community's first wide coverage area FM station. The proposal was mutually exclusive to the Belton proposal (Option VII). KTEM supports the Brenham and Round Rock proposals (Options II and IV).

COMMENTS

5. *BRENHAM, TEXAS* - (population 10,966). Whitehead, in its comments, urges the adoption of either Option II or IV (Brenham and Round Rock), in order to permit allocations to the maximum number of communities. Whitehead reaffirms its intention to upgrade Station KWHI(FM) and promptly construct the new facility including the relocation of its transmitter site. San Jacinto filed comments in support of the Brenham proposal.

6. *AUSTIN, TEXAS* - (population 345,890). Grass Roots, the proponent, argues for the allocation of Channel 290C1 to Austin without a site restriction or, in the alternative, the allocation of Channel 290C2 to Austin. Grass Roots alleges that all the communities at issue have at least two local fulltime aural services. Therefore, it contends that because Austin is the most populous of the communities under review, it is most deserving of an additional allocation.

7. *BELTON, TEXAS* - (population 10,660). In its comments, Heart of Texas, contends that most of the proposals are for communities adjacent to the major markets of Houston and Austin and considered "bedroom communites." Heart of Texas claims that since no first or second aural service would result from any of the proposals, this case should be governed by priorities (3) and (4) *infra*. Thus the public interest considerations should favor the Belton upgrade.

8. *ROUND ROCK, TEXAS* - (population 12,740). R.R. Radio, in its comments, states that Channel 290C1 cannot be allocated to Round Rock due to the lack of available sites. Therefore, R.R. Radio supports the allotment of Channel 290C2 at Round Rock and the Brenham upgrade (Option II). In supporting comments, Ixoye states an intention to apply for Channel 290C2 at Round Rock. It also asserts that site availability problems as well as difficulty in providing a city-grade signal over Round Rock prohibit the allotment of the Class C1 facility to Round Rock. Bamberger also states his concerns about the problems of available sites for Channel 290C1 at Round Rock. Nevertheless he states that if the allotment is made to Round Rock or Caldwell he intends to apply for the channel.

9. Oppenheimer filed supporting comments expressing an interest in applying for the allocation at either Round Rock, Austin or West Lake Hills.

10. In reply comments, Whitehead, Grass Roots, R.R. Radio, San Jacinto and KTEM restated their positions. Whitehead (Brenham) responded to the comments of Heart of Texas (Belton), as "procedurally defective; factually inaccurate; and substantively without merit." *See* para. 7, *supra*. Whitehead further disputes Heart of Texas' argument that all the other proposals, in particular Round Rock and Brenham, are bedroom communities of Austin or Houston. R.R. Radio also contends that the allegations made by Heart of Texas are unsupported and without merit.

11. In its reply comments, Grass Roots submitted letters from various parties in Austin endorsing its proposal. Grass Roots, in its attempt to prevail in providing an additional voice at Austin, argues that since the original proponents at Caldwell and West Lake Hills failed to respond to the *Notice* and Bamberger and Oppenheimer failed to "certify site availability" no further consideration should be given to those proposals.

DISCUSSION

12. First, we shall address some preliminary matters. We note that commenting parties have raised sufficient doubt as to the availability of transmitter sites for Channel 290C1 at Round Rock to provide city grade coverage. Since each of the interested parties are willing to apply for a Class C2, we believe it is more appropriate to consider allotting Channel 290C2 with a lesser site restriction. Additionally, further engineering analysis of the Temple proposal reveals that site restrictions would place the transmitter for Channels 282C1 and 284C2 at Temple too far away for adequate coverage. Therefore, we believe consideration only of Channel 282C2 at Temple is justified.

13. We find that arguments raised by Heart of Texas concerning the "bedroom community" status of most of the proposals are without merit. Heart of Texas' allegations are unsupported by sufficient factual data to rebut the presumption of independent community status we normally employ. Moreover, the Commission has held on numerous occasions that service from stations located outside the community is not a substitute for local service. *See Clinton, Louisiana*, 45 R.R. 2d 1587 (1979) and *Westover and Grafton, West Virginia*, 46 FR 10737 (1981).

14. In regard to the arguments raised by Grass Roots concerning site certification, this requirement applies to the application stage and is not required in rule making proceedings. Grass Roots' allegation that each proposed allotment considered herein is to a city with at least two local services is factually incorrect. The only station licensed to Round Rock is a noncommercial educational

station, and the Commission does not consider such services when choosing between commercial allotments. *See Ojai and Santa Barbara, California*, 53 RR 2d 1354 (1983).

15. Based on expressions of interest, we find that all communities herein are deserving of receiving new or improved FM service. However, we have determined that no other channels are available at the other communities to resolve the conflicts. Therefore, having concluded that the proposals set forth herein should be comparatively considered, we are guided by the allocation criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First fulltime aural service

(2) Second fulltime aural service

(3) First local service

(4) Other public interest matters

[Co-equal weight given to priorities (2) and (3)]

Our determination is that no first or second fulltime aural service would be provided by any of the proposals herein, thus eliminating priorities (1) and (2) enumerated above. Thus, priority is given to providing a first local service (3) at either Round Rock or West Lake Hills. As between these two communities, and considering the fact that Station KTXZ(AM) is licensed at West Lake Hills, the clear decision favors Round Rock, with 12,740 persons as opposed to West Lake Hills' 2,166.

16. In view of the above discussion, we believe the public interest would be served by allocating Channel 290C2 to Round Rock, as that community's first FM service. This allotment would also permit the substitution of Channel 291C2 for Channel 292A at Brenham, as that community's first wide coverage area FM station (Option II). In addition, the substitution of Channel 282C2 for Channel 285A at Temple, Texas, as a first wide coverage area FM station, is technically compatible with Brenham and Round Rock. The aforementioned allocations preclude the proposals at Austin, Belton, Caldwell and West Lake Hills. Thus, those proposals will be denied.

17. We believe our determination is in conformance with the mandate of Section 307(b) of the Communications Act of 1934, as amended, to provide a fair, efficient and equitable distribution of radio services among the various communities.

18. The allotments of Channel 290C2, Channel 291C2 and 282C2 can be made to Round Rock, Brenham and Temple, respectively, in compliance with the minimum distance separation requirements contained in Section 73.207(b) of the Commission's Rules, with site restrictions. In order for Round Rock and Brenham to co-exist, Channel 290C2 at Round Rock requires a site restriction of 17.9 kilometers (11.1 miles) west of the community.[8] Channel 291C2 as a substitute for Channel 292A at Brenham requires a site restriction of 17.4 kilometers (10.8 miles) west of the community to avoid a short spacing to Station KIOC-FM, Channel 291 at Orange, Texas.[9] Channel 282C2 as a substitute for Channel 285A at Temple requires a site restriction of 20.4 kilometers (12.7 miles) southwest of the city[10] in order to avoid short spacings to Station KKDA-FM, Channel 283C at Dallas, Texas, and a pending proposal to upgrade Station KCRM(FM), Channel 276A, at Cameron, Texas to Channel 280C2 (MM Docket No. 87-209, RM-5768).[11]

19. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the licenses of Station KWHI(FM) at Brenham, and Station KPLE(FM) at Temple, to specify operation on Channel 291C2 and Channel 282C2, respectively.

20. Since Round Rock is located within 320 kilometers (199 miles) of the common U.S.-Mexico border, concurrence by the Mexican government has been obtained.

21. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Brenham, Texas	231A, 291C2
Round Rock, Texas	290C2
Temple, Texas	269A, 282C2

22. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KWHI(FM), Brenham, Texas IS MODIFIED, to specify operation on Channel 291C2 in lieu of Channel 292A and the license of Station KPLE(FM), Temple, Texas, IS MODIFIED, to specify operation on Channel 282C2 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

23. The window period for filing applications for Channel 290C2 at Round Rock will open on **June 14, 1988,** and close on **July 14, 1988.**

24. IT IS FURTHER ORDERED, That the petitions of James Duff McClish, Sr., (RM-5069), Call FM Radio (RM-5397), Alvin O. Kriegel, Jr., (RM-5420) ARE DISMISSED.

25. IT IS FURTHER ORDERED, That the petitions of Grass Roots Radio (RM-5199) and Heart of Texas Communications, Ltd., (RM-5497) ARE DENIED.

26. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

27. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Temple, Texas, has been added to the caption.

[2] McClish, Call FM and Kriegel failed to file comments reaffirming their interest in the prposed allotments at Round Rock, Caldwell and West Lake Hills, respectively.

[3] Public Notice of the counterproposal was given on February 6, 1987, Report No. 1642 (RM-5722).

[4] In addition, late-filed reply comments were submitted by KCRM Broadcasting, Inc. (KCRM), licensee of Radio Station KCRM(FM), Cameron, Texas, to which KTEM responded. KCRM also filed a "Motion to Strike Unauthorized Response to Reply Comments." An Opposition to the motion was filed by KTEM, to which KCRM responded. Radio U.S.A., Ltd (Radio U.S.A.), licensee of Station KKYS(FM), Channel 285A, Bryan, Texas, filed a motion requesting acceptance of late filed comments. KTEM filed an opposition. KCRM requested leave to file a motion to strike the comments of Radio U.S.A. A consolidated reply to the oppositions of KTEM and KCRM was filed by Radio U.S.A. In accordance with Section 1.415(d) of the Commission's Rules, we have not considered the aforementioned late-filed pleadings.

[5] Channel 236A has since been allotted to Caldwell, Texas. Thus, this proposal would provide a second local FM service at Caldwell. *See Caldwell, Texas*, 2 FCC Rcd 5244 (1987).

[6] The *Notice* also required that Station KISJ-FM, Channel 281C, Brownwood, Texas, be reclassified as a Class C1 facility in order to permit the Belton upgrade. The Brownwood station has been automatically reclassified to a Class C1 station as of March 2, 1987. *See Public Notice*, 52 FR 12964, April 20, 1987.

[7] Population figures are taken from the 1988 U.S. Census.

[8] The coordinates for this site are 30-34-05 and 97-51-09.

[9] The coordinates for this site are 30-11-24 and 96-34-19.

[10] The coordinates for this site are 30-56-56 and 97-28-17.

[11] In the event that Station KCRM is not successful in its efforts to upgrade its facilities, Channel 282C2 may be utilized at a site 18.7 kilometers (11.6 miles) south of Temple (30-55-53 and 97-23-04). This restriction would afford protection to the Dallas station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-501

In the Matter of

Amendment of Section 73.202(b), RM-6051
Table of Allotments,
FM Broadcast Stations.
(Old Forge, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1988; Released: May 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of George W. Kimble (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6861 (1987), proposing the allocation of Channel 259A as the community's first local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allocated.[1] No other comments were received.

2. Channel 259A can be allocated to Old Forge in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.9 kilometers (5.6 miles) southwest to avoid a short-spacing to the construction permit of Station WGFB, Channel 260C, Plattsburgh, New York.[2] Canadian concurrence has been received since Old Forge is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allocating Channel 259A to Old Forge since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Old Forge, New York	259A

4. The window period for filing applications will open on **June 14, 1988,** and close on **July 14, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were not timely filed. However, they have been accepted for purposes of expressing continuing interest.

[2] The coordinates for this allotment are North Latitude 43-39-35 and West Longitude 75-03-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-206

In the Matter of

Amendment of Section 73.202(b), RM-5702
Table of Allotments,
FM Broadcast Stations.
(Etowah and Jamestown, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1988; Released: May 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Bvack Broadcasting, Inc., licensee of Station WVKS(FM), Channel 276A, Etowah, Tennessee (petitioner)[1], the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 3687 (1987), proposing the substitution of Channel 276C2 for Channel 276A at Etowah, and modification of its license to specify the higher class co-channel. If the proposal set forth in the *Notice* is adopted, the community of Etowah could receive its first wide coverage area FM station. In addition, the *Notice* proposed the substitution of Channel 286A for 276A at Jamestown, Tennessee, and the modification of Station WCLC-FM in order to accomodate the Etowah proposal. An *Order to Show Cause* why the license should not be modified was directed to Jamestown Broadcasting Company, Inc., licensee of Station WCLC-FM.

2. In response to the *Notice*, petitioner filed supporting comments reaffirming its intention to construct the modified facilities. John M. Barrick (Barrick), licensee of Station WOVO(FM), Channel 288A, Glasgow, Kentucky, filed a counterproposal requesting the substitution of Channel 285C2 for Channel 288A and modification of his license accordingly. Barrick also suggested channel substitutions at Jamestown, Kentucky (Channel 284A for Channel 285A) and Leitchfield, Kentucky (Channel 282A for Channel 285A), in order to accomplish the Glasgow substitution. Reply comments were filed by petitioner and Barrick.

3. The Glasgow proposal conflicts with the necessary channel change proposed at Jamestown, Tennessee. Petitioner, in its reply comments, states that the relocation of the transmitter site for Station WOVO-FM at Glasgow would resolve the conflict and permit both communities to receive improved service. Barrick responded in favor of the imposition of a site restriction to permit both proposals.

4. However, we have determined that the Glasgow counterproposal is technically defective due to a 28.7 kilometer short spacing to the suggested alternative channel at Jamestown, Kentucky (Channel 284A). Furthermore, the short spacing to Channel 284A at Jamestown, Kentucky, cannot be remedied by imposition of a site restriction without creating a short spacing to Station WPKY-FM, Channel 285A, Princeton, Kentucky. We have been unable to find a site which would protect both channels and still provide a city-grade signal to the community. Thus, the allotment of Channel 285C2 at Glasgow cannot be made in compliance with the Commission's minimum spacing requirements, regardless of whether we make the allotment proposed by petitioner. Therefore, the counterproposal is unacceptable for consideration herein.[2]

6. After careful consideration of the aforementioned, the Commission believes the public interest would be served by the allotment of Channel 276C2 as a substitute for Channel 276A at Etowah, Tennessee. The substitution can be made in compliance with the Commission's minimum spacing requirements with a site restriction of 13.5 kilometers (8.4 miles) north of Etowah, in order to avoid a short spacing to Station WVEE(FM), Channel 277, Atlanta, Georgia. In addition, Channel 286A must be substituted for Channel 276A at Jamestown, Tennessee. Since Jamestown Broadcasting Company, Inc., has not responded to the *Show Cause Order* we deem it to have consented to the modification of its license.

7. Petitioner has agreed to reimburse WCLC-FM for the reasonable costs incurred by changing frequencies, as required by Commission policy.

8. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WVKS(FM) to specify operation on Channel 276C2.

9. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 13, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communiies listed below, as follows:

City	Channel No.
Etowah, Tennessee	276C2
Jamestown, Tennessee	280A, 286A

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WVKS(FM), Etowah, Tennessee, IS MODIFIED, to specify operation on Channel 276C2 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WCLC-FM, Jamestown, Tennessee, IS MODIFIED, to specify operation on Channel 286A in lieu of Channel 276A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in [License BLH-851112KI] except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with [License BLH-851112KI] except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner is also the licensee of AM Station WCPH.

[2] It should be noted that in a separate proceeding (RM-6245) the Commission has proposed the allotment of Channel 285A to Woodbury, Tennessee, as that community's first local FM service. If adopted, this proposal would preclude the use of Channel 285C2 at Glasgow. *See Memorandum Opinion* and Order in MM Docket No. 84-14, released February 24, 1988 (DA 88-198).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-173

In the Matter of

Amendment of Section 73.202(b), RM-6249
Table of Allotments,
FM Broadcast Stations.
(Brandon, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by James G. Kirkpatrick (petitioner), seeking the allocation of Channel 270A to Brandon, Vermont, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 270A can be allotted to Brandon in compliance with the Commission's minimum distance separation requirements.[1] Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence must be obtained from the Canadian government.

3. In view of the fact that Brandon, Vermont, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Brandon, Vermont	---	270A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 20, 1988,** and reply comments on or before **July 5, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard A. Topel, Esquire
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue
Suite 500
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposal are 43-47-54 and 73-05-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-174

In the Matter of

Amendment of Section 73.202(b), RM-6283
Table of Allotments,
FM Broadcast Stations.
(Waunakee, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of WIBU, Inc. (petitioner), the Commission considers herein a petition for rule making seeking the allocation of Channel 286A to Waunakee, Wisconsin, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 286A can be allotted to Waunakee in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.7 kilometers (3.5 miles) northeast of the community.[1] The restriction is necessary to avoid short spacings to Station WNFM(FM), Channel 285A, Reedsburg, Wisconsin and a pending proposal for Channel 288A at Verona, Wisconsin (MM Docket No. 87-524).

3. In view of the fact that Waunakee, Wisconsin, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Waunakee, Wisconsin	---	286A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 20, 1988,** and reply comments on or before **July 5, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James L. Oyster, Esquire
Law Offices of James L. Oyster
8315 Tobin Road
Annandale, VA 22003-1101
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposed site are 43-12-34 and 89-23-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-175

In the Matter of

Amendment of Section 73.202(b), RM-6248
Table of Allotments,
FM Broadcast Stations.
(Lawrenceburg, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Roger W. Wright (petitioner)[1], the Commission has before it for consideration a petition for rule making seeking the allocation of Channel 248A to Lawrenceburg, Tennessee, as that community's second local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 248A can be allotted to Lawrenceburg in compliance with the Commission's minimum distance separation requirements with a site restriction. A site restriction of 5.4 kilometers (3.4 miles) southwest of the community is necessary in order to avoid a short spacing to Station WSIX-FM, Channel 250C at Nashville, Tennessee.[2]

3. In view of the fact that Lawrenceburg, Tennessee, could receive its second local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lawrenceburg, Tennessee	240A	240A, 248A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 20, 1988**, and reply comments on or before **July 5, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lauren A. Colby, Esquire
Law Office of Lauren A. Colby
10 E. Fourth Street
P. O. Box 113
Frederick, MD 21701
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner is the licensee of Station WLLX(FM), Channel 221A, Minor Hill, Tennessee.

[2] The coordinates for the proposed site are 35-12-30 and 87-22-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-176

In the Matter of

Amendment of Section 73.202(b), RM-6218
Table of Allotments,
FM Broadcast Stations.
(Albin, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 30, 1988; Released: May 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Alton Lewis (petitioner), seeking the allocation of Channel 296C2 to Albin, Wyoming, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 296C2 can be allotted to Albin in compliance with the Commission's minimum distance separation requirements with a site restriction. A site restriction of 28.5 kilometers (17.7 miles) north of the community is necessary in order to avoid a short spacing to Station KKDD(FM), Channel 296A at Brush, Colorado.[1]

3. In view of the fact that Albin, Wyoming, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Albin, Wyoming	---	296C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 20, 1988,** and reply comments on or before **July 5, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Daniel F. Van Horn, Esquire
Arent, Fox, Kintner, Plotkin
& Kahn
1050 Connecticut Avenue, N.W.
Washington, D. C. 20036-5339
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposed site are 41-40-00 and 104-11-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-410

Amendment of Section 73.202(b)	RM-5428
Table of Allotments,	RM 5469
FM Broadcast Stations,	RM-5688
(Columbia, Eldon and Centralia, Cabool	RM-5792
and Mountain Grove, Missouri	

ERRATUM

Released: May 4, 1988

On March 14, 1988, the Commission's Mass Media Bureau released a Report and Order (DA 88-347) in the captio **May 16, 1988.** In addition, the dates upon which the window period for filing applications will open and close are corrected to read **May 17, 1988** and **June 15, 1988** respectively.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase III, Part 1

In the Matter of

Investigation of
Special Access Tariffs of
Local Exchange Carriers

ERRATUM

Released: May 4, 1988

1. In the Order in the above-entitled matter, 3 FCC Rcd. 1119 (1988), the following typographical error requires correction.

2. In the heading, the docket should be "CC Docket No. 85-166" instead of "MM Docket No. 85-166".

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-155

In the Matter of

SILVER STAR COMMUNICATIONS-ALBANY, INC.

Licensee of Radio Stations
WJMJ and WFAV-FM
Cordele, Georgia

Order to Show Cause Why the Licenses
of WMJM and WFAV-FM, Cordele,
Georgia, should not be revoked

ERRATA

Released: May 4, 1988

Initial Decision FCC 88D-10, released April 7, 1988, IS CORRECTED as follows:

Paragraph 36, line 15 - change the word "it" to "they":;

Paragraph 87, line 3 - change the word "Cordele's" to read "Cooke's";

Paragraph 99, line 1 - change "1985" to read "1983";

The following reproduction errors ARE ALSO CORRECTED:

Paragraph 32, line 7 - insert quote mark after the word "intimate";

Paragraph 37, line 7 - change the word "particularity" to read "particularly";

Paragraph 39, line 5 change the word "proceeding" to read "preceding";

Paragraph 40, line 8 - insert quote mark after the word "writing";

Paragraph 41, line 40 - insert quote mark after the word "WFAV";

Paragraph 41, line 46 - insert quote mark after the word "proper";

Paragraph 57, line 4 - insert comma mark after the word "conversation";

Paragraph 58, line 2 - insert quote mark after the word "Agreement";

Paragraph 66, line 10 - insert quote mark after the word "Rivers";

Paragraph 74, line 17 - insert quote mark after the word "property";

Paragraph 94, line 3 - insert quote mark after the word "Facilities";

Paragraph 99, line 22 - insert quote mark after the word "agreement";

Paragraph 100, line 19 - insert quote mark after the word "sham";

Paragraph 100, line 22 - insert quote mark after the word "strawman";

Paragraph 101, line 2 - insert quote mark after the word "disguised";

Paragraph 102, line 2 - insert quote mark after the word "intended" - remove quote mark before the word "following";

Paragraph 103, line 2 - change the word "provision" to read "provisions";

Paragraph 109, line 8 - insert quote mark after the word "chip".

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS TELECOMMUNICATIONS, INC. File No. CSG-87-061-P/L

Application for authority to construct and operate a 4/6 GHz international earth station at Chandler, Arizona, for provision of INTELSAT Business Service

ORDER AND AUTHORIZATION

Adopted: April 22, 1988; Released: May 4, 1988

By the Acting Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned application filed on July 22, 1987, and supplemented by letters of September 16 and 18, 1987; October 8, 13 and 14, 1987; December 31, 1987; and March 31, 1988, by Overseas Telecommunications, Inc. (OTI), seeking authority pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Chandler, Arizona, for the provision of INTELSAT Business Service (IBS). The application was placed on public notice on August 5, 1987. Comments were filed by Comsearch on August 28, October 14 and November 23, 1987. OTI has been granted authority pursuant to Section 214 of the Communications Act of 1934 to establish and operate channels of communication between the U.S. and various overseas points for the provision of INTELSAT Business Services and international television service.[1]

2. On October 23, 1987, the Commission granted OTI Special Temporary Authority (STA) to construct and operate the facilities with a limited transmitting frequency band for six months subject to: conditional clearance by Comsearch; notification to Arizona State Parks, Office of Historic Preservation, in the event that construction uncovered any finds of an archaeological nature; and that a final frequency coordination be filed with the Commission within three months of the grant date of the STA.

3. The proposed earth station will consist of an 8.1 meter antenna which conforms with INTELSAT Standard F-2 technical parameters and will communicate with an Atlantic Ocean Region (AOR) INTELSAT satellite located at 53 degrees West Longitude in the 6/4 GHz band. The station will be located at Chandler, Arizona, and will be used to provide a full range of IBS services.

4. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television service do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only the minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] Based on this approach, the Commission has granted several applications to construct and operate earth stations to provide both IBS and international television service.[4]

5. The applicant's legal, technical and financial qualifications to construct and operate the proposed earth station are established. OTI has been authorized to construct and operate other earth stations for IBS and/or television service.[5] The proposed earth station complies with INTELSAT Standard F-2 technical parameters for IBS earth stations. OTI has completed the necessary frequency coordination subject to the following conditions:

A. Written notification will be forwarded to U.S. Sprint two weeks prior to activation.

B. Applicant will perform cooperative testing with MCI Telecommunications and American Television Relay's Pinal Peak receivers.

C. In the event that harmful interference is detected at the US Sprint, MCI, or American Television Relay's receivers, OTI will take immediate remedial actions to alleviate the interference.

D. The tree shielding shown on the plot plans attached to Comsearch's letter of November 23, 1987, on behalf of American Television Radio will be completed before full activation.

6. We will limit this authorization to the provision of IBS and related digital video services. The applicant may not provide any service which falls outside this service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

7. Upon consideration of the application, we find that authorization for the construction and operation of the requested earth station facilities to provide IBS and related digital video services is required by the public convenience and necessity.

8. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-87-061-P/L IS GRANTED, and OTI is authorized to construct and operate the proposed earth station facilities at Chandler, Arizona, for the provision of IBS and related digital video services.[6] OTI may operate the facility under the existing Special Temporary Authority with limited

transmitting frequency band until such time as the facility is in compliance with the terms and conditions set forth in paragraph 5 of this order, but not beyond 45 days from the release date of this order. The applicant shall provide the Commission with a summary of equipment which was actually installed and that the coordination conditions have been met.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between OTI and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

10. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Overseas Telecommunications, Inc., DA 86-24, released October 9, 1986, File No. I-T-C-86-163.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television service, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* Overseas Telecommunications, Inc., DA 86-128, released October 31, 1986, File No. CSG-86-071-P/L.

[5] *See* Overseas Telecommunications, Inc., DA 86-128, released October 31, 1986, File No. CSG-86-071-P/L.

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-494

In the Matter of

Regulatory Policies And
International Telecommunications

ERRATUM

Released: May 4, 1988

1. On March 25, 1988, the Commission released a *Report And Order And Supplemental Notice of Inquiry* [1] (*Order)* which adopted, *inter alia*, annual procurement reporting requirements for Tier I local exchange carriers, their holding companies, and affiliates and for interexchange carriers that have revenues exceeding100 million annually from common carrier operations. We also concluded that this requirement will expire after three years absent a specific determination by this Commission that an extension of this requirement is appropriate. Accordingly, paragraph 100(3) of the *Order* should read:

> That all Tier I Local Exchange Carriers, their holding companies and affiliates and all interexchange carriers with annual common carrier revenues exceeding100 million must file with the Common Carrier Bureau reports for procurement of core equipment: (a) for the calendar year 1987 on or before July 1, 1988; (b) for the calendar year 1988 on or before May 1, 1989; and (c) for the calendar year 1989 on or before May 1, 1990.

Appendix B, Part 1 should read:

> Section 63.801 Annual Procurement Reports
>
> (a) Tier I local exchange carriers, their holding companies and affiliates, and interexchange carriers with common carrier operations exceeding100 million annually must file reports concerning their procurement of all pieces of network switching and transmission equipment;
>
> (b) the report should be captioned -- "Section 63.801 Report" -- and list by name of manufacturer or supplier, aggregate annual dollar procurement of network switching and transmission equipment in categories determined by the Chief, Common Carrier Bureau; and
>
> (c) annual procurement reports: (i) for the calendar year 1987 must be filed on or before July 1, 1988; (ii) for the the calendar year 1988 must be filed on or before May 1, 1989; and (iii) for the calendar year 1989 must be filed on or before May 1, 1990.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] Regulatory Policies And International Telecommunications, CC Docket No. 86-494, FCC 88-71, released March 25, 1988 (*Report And* Order And Supplemental Notice of Inquiry).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur
Service Rules Concerning
Examination Credit for an
Amateur Extra Class Operator
License.

ORDER

Adopted: April 26, 1988; Released: May 4, 1988

By the Chief, Private Radio Bureau

1. On January 25, 1988, Marvin Fricklas filed a petition to amend Section 97.23 of the Commission's Amateur Service Rules, 47 C.F.R. § 97.23, to upgrade, without examination, long-term Advanced Class operator licensees. In order to be eligible for the upgrade to Amateur Extra Class operator, the Advanced Class operator must have served in the armed forces and rendered public service. An Advanced Class licensee is currently required to pass examination elements 1(C)[1] and 4(B)[2] in order to become an Amateur Extra Class licensee.

2. The petitioner requests that the rules be revised to permit an Advanced Class operator to be upgraded to Amateur Extra Class without further examination, provided that he/she (1) has twenty-five years of continuous activity as a United States amateur service licensee, (2) submits evidence of rendering continuous public service in the amateur service, and (3) presents an honorable discharge from the United States Armed Forces. The petitioner states that many amateur operators who render distinguished service to the community are not recognized for their efforts. He also argues that amateur operators who are military veterans should be recognized. The upgrading of public-service oriented, military veterans from Advanced Class operators to Amateur Extra Class is viewed as an appropriate form of recognition. The proposed rule revision would permit volunteer examiners to verify the applicant's eligibility for upgrading.

3. Amateur operator licenses are issued only to persons who demonstrate certain operational and technical skills. The requirement that only a qualified person can hold an amateur operator license is based upon provisions in the international Radio Regulations Nos. 2735 and 2736 (Geneva, 1979) and the Communications Act of 1934, as amended, 47 U.S.C. § 303(l)(1). The Commission's policy is not to waive the examination requirements for any applicant. In fairness to all, no individual or group is given preferential treatment. *See Report and Order*, General Docket No. 78-250, 47 Fed. Reg. 14197 (1982).

4. Service in the armed forces and public service activities as an amateur radio operator are indeed commendable. However, such services are not sufficient reason to revise the Commission's policy of not granting preferential treatment to any group or individual.

5. The instant petition proposes to revise amateur operator qualifications, an issue that has been decided by the Commission in previous proceedings. Accordingly, the petition is repetitive and does not warrant action by the full Commission.

6. IT IS THEREFORE ORDERED, pursuant to Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), that the petition to amend Section 97.23 IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Element 1(C) is a telegraphy examination to prove the person has the ability to send and receive correctly text in the international Morse code at 20 words per minute. *See* Section 97.21(a) of the Commission's Rules, 47 C. F. R. § 97.21(a).

[2] Element 4(B) is a 40 question written examination concerning the privileges of the Amateur Extra Class operator license. *See* Section 97.21(c) of the Commission's Rules, 47 C. F. R. § 97.21(c). The passing grade is 74%. *See* Section 97.29(b) of the Commission's Rules, 47 C. F. R. § 97.29(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-41

In the Matter of

Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations.	RM-4864

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 15, 1988; Released: May 4, 1988

By the Commission:

1. The Commission has before it three petitions for reconsideration[1] and/or clarification of its *Report and Order* [2] (the *Report and Order)* amending Section 1.420 of its Rules by providing a procedure whereby licensees and permittees of commercial and noncommercial educational television stations can exchange channels. Petitions were filed: (1) jointly by American Family Corporation; Tribune Broadcasting Company; Cox Communications, Inc.; Bonneville International Corp.; Gannett Company, Inc.; Kelly Broadcasting Co.; Koplar Communications, Inc.; McGraw-Hill Broadcasting Company, Inc.; The New York Times Broadcasting Service, Inc.; Taft Television and Radio Company, Inc.; Storer Communications, Inc.; and Scripps-Howard Broadcasting Company; (2) jointly by Belo Broadcasting Corporation; Post Newsweek Stations, Inc.; and Westinghouse Broadcasting & Cable, Inc.; and (3) by The National Association of Public Television Stations. Oppositions were received from Florida West Coast Public Broadcasting, Inc. and from WTOG-TV, Inc. Belo Broadcasting Corporation and Post Newsweek Stations, Inc. filed a reply.

2. In the *Report and Order*, the Commission amended Section 1.420 by adding a new paragraph (h), which established a procedure whereby the Commission might, if it found that the public interest, convenience, and necessity would be advanced, modify television station licenses and permits and change the educational channel reservation in the course of rule making proceedings amending the Television Table of Allotments, Section 73.606(b) of the Rules. [3] The instant petitioners for reconsideration ask that the *Report and Order* be modified or clarified to specifically limit channel exchanges to the intraband context. The petitioners indicate that the underlying rationales used in the *Report and Order* may be used to justify interband exchanges, and not simply intraband exchanges. The National Association of Public Television Stations also requests that the Commission terminate the instant proceeding.

3. The *Report and Order* did not apply to interband exchanges of noncommercial for commercial television channels, and was expressly limited to intraband exchanges. Furthermore, while certain of the policy rationales in the *Report and Order* may be applicable in the context of interband exchanges, the Commission made no determination in the *Report and Order* concerning the applicablity of those rationales to interband exchanges. Therefore, because the *Report and Order* was clearly limited to intraband exchanges, the petitions for clarification will be denied. We will also deny petitioners' request for modification of the *Report and Order*. On December 22, 1987, the President signed into law House Joint Resolution 395 containing appropriations legislation for the Commission for Fiscal Year 1988.[4] This statute appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act may be used to diminish the number of VHF channel assignments reserved for noncommercial educational television stations in the Television Table of Assignments (section 73.606 of title 47, Code of Federal Regulations) . . . .

Consistent with the letter and spirit of the appropriations legislation, the Commission will terminate this proceeding, and will take no actions which would result in diminution of the number of VHF channel assignments reserved for noncommercial educational use. Therefore, we believe it is unnecessary to modify the *Report and Order*.

4. Accordingly, IT IS ORDERED, That the Petition for Reconsideration and Clarification filed by American Family Corporation; Tribune Broadcasting Company; Cox Communications, Inc.; Bonneville International Corp.; Gannett Company, Inc.; Kelly Broadcasting Co.; Koplar Communications, Inc.; McGraw-Hill Broadcasting Company, Inc.; The New York Times Broadcasting Service, Inc.; Taft Television and Radio Company, Inc.; Storer Communications, Inc.; and Scripps-Howard Broadcasting Company IS DENIED.

5. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Belo Broadcasting Corporation; Post Newsweek Stations, Inc.; and Westinghouse Broadcasting & Cable, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration and Clarification filed by The National Association of Public Television Stations IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. Authority for the action taken herein is contained in Section 4(i) of the Communications Act of 1934, as amended, and Pub. L. No. 100-202 (signed December 22, 1987).

9. For further information concerning this proceeding, contact Karl Kensinger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Public Notice was given on June 2, 1986.

[2] 51 Fed. Reg. 15628 (1986).

[3] Such modifications and channel exchanges would be considered in response to joint petitions filed by commercial and noncommercial educational television licensees and permittees seeking to exchange channels within the same band (*i. e.*, UHF for UHF or VHF for VHF) and in substantially the same market.

[4] Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed December 22, 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-341

In the Matter of

Amendment of Section 73.202(b), RM-5779
Table of Allotments,
FM Broadcast Stations.
(Wichita Falls, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 4, 1988; Released: May 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5334 (1987), issued at the request of Wichita Falls Communications, (petitioner), licensee of Station KTLT(FM), Channel 292A, Wichita Falls, Texas, proposing the substitution of Channel 292C2 for Channel 292A and modification of its license to specify operation on the higher class channel. Petitioner filed supporting comments restating its intention to upgrade the station's facilities.

2. It is our conclusion that the public interest would be served by the channel substitution at Wichita Falls providing an expanded FM service to that community. The substitution can be made in compliance with the Commission's minimum separation requirements using the petitioner's current site (33-53-18 and 98-34-08). In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KTLT(FM) to specify operation on Channel 292C2.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Wichita Falls, Texas	225C 260C1, 277C, 288A, 292C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KTLT(FM), Wichita Falls, Texas, IS MODIFIED, to specify operation on Channel 292C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-436

In the Matter of

Amendment of Section 73.202(b), RM-6024
Table of Allotments,
FM Broadcast Stations.
(Eagle Nest-Angel Fire, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1988; Released: May 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Francis O'Connell d/b/a Moreno Valley Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6321 (1987), proposing the allocation of Channel 256C2 to either Eagle Nest or Angel Fire, New Mexico, or to both communities on a hyphenated basis, as a first local allocation. Petitioner filed comments supporting the allocation on a hyphenated basis. No other comments were received.

2. As stated in the *Notice*, petitioner was requested to furnish data to support a conclusion that either Angel Fire or Eagle Nest are communities for allotment purposes since neither location is listed in the U.S. Census. In response, petitioner states that Angel Fire and Eagle Nest are year-round resort communities located in the Moreno Valley, approximately 26 miles east of Taos, New Mexico, and 152 miles northeast of Albuquerque, New Mexico. Petitioner states that the area, which has experienced rapid growth in the past three years, has a permanent population of 1,200 to 1,500 persons. According to petitioner, Angel Fire dominates the winter season as the fourth largest ski area in New Mexico, and offers a wide variety of summer activities such as golf, swimming, horseback riding and hiking. It has 85 year-round and 61 seasonal businesses, many of which identify themselves with the community, such as the Angel Fire Sportsman, Angel Fire Country Club, Angel Fire Auto, Angel Fire Pharmacy, and Angel Fire Cable TV. It also has community organizations such as the Angel Fire Chamber of Commerce, a Property Owners Association, Angel Fire Opera Guild and a repertory theater. In addition, Angel Fire has a Board of Governors, fire department, ambulance service, library, and its own postal zip code. Water and sewer services are provided by the Angel Fire Services Corporation.

3. As to Eagle Nest, petitioner states that this area dominates the summer activity with fishing and boating on the 2000 acre Eagle Nest Lake. Further, we are told that Eagle Nest, with a 1980 U.S. Census of 202 persons, and a 1986 population of 233 persons, also has its own Chamber of Commerce, Community Center, postal zip code and 28 year-round and 5 seasonal businesses.

4. We believe that petitioner has provided sufficient evidence to show that Angel Fire is a community for allotment purposes. Angel Fire, with a population of 500 persons,[1] has attributes which are commonly associated with a community, such as a Board of Governors, fire department, ambulance service, library, post office and separate zip code. In addition, it has almost 150 businesses, many of which identify themselves with Angel Fire. Based on this showing, we believe the public interest would be served by allocating Channel 256C2 to Angel Fire, as the community's first local FM service.

5. We also find that petitioner has not provided sufficient evidence that Angel Fire and Eagle Nest should be considered as one community for allotment purposes. Angel Fire and Eagle Nest are located close to each other and each is dependent upon tourism for its economic well-being. However, petitioner provides no information to indicate that the residents of one community are dependent upon the other for economic, trade, cultural or social services, or that the two communities are so closely identified with each other that the allotment cannot sensibly be made to only one community. Indeed, petitioner provided no direct evidence supporting its proposal to hyphenate the two communities. Therefore, we will not allocate Channel 256C2 to Angel Fire-Eagle Nest on a hyphenated basis.

6. Although there may be sufficient indicia of community status to warrant a conclusion that Eagle Nest is a community, we believe that Eagle Nest, with a 1980 Census population of 202, is less in need of a first local service than the larger community of Angel Fire. The evidence submitted by petitioner also indicates quite clearly that Angel Fire is more important as a center of commerce than Eagle Nest.

7. Based on the above discussion, we believe that the public interest would be served by allocating Channel 256C2 to Angel Fire, New Mexico, since an interest has been expressed in providing the community with its first local FM service. Channel 256C2 can be allocated to Angel Fire in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Angel Fire, New Mexico	256C2

8. The window period for filing applications will open on **June 21, 1988,** and close on **July 21, 1988.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figure is taken from the 1988 Rand McNally Commercial Atlas.

[2] The coordinates for this allotment are North Latitude 36-23-00 and West Longitude 105-18-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-377

In the Matter of

Amendment of Section 73.202(b), RM-5783
Table of Allotments,
FM Broadcast Stations.
(Kekaha, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1988; Released: May 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5624 (1987), proposing to allot Channel 277A to Kekaha, Hawaii, at the request of Timothy D. Martz (petitioner). Comments were filed by the petitioner, restating his interest in the channel.

2. We find that the public interest would benefit from the proposal for a first FM channel allotment to Kekaha. The allotment can be made in compliance with the minimum distance separation requirements.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Kekaha, Hawaii	277A

4. The window period for filing applications will open on **June 21, 1988,** and close on **July 21, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 277A at Kekaha are 31-58-06 and 159-42-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-300

In the Matter of

Amendment of Section 73.202(b), RM-5704
Table of Allotments,
FM Broadcast Stations.
(Coeur d' Alene, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1988; Released: May 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 4714 (1987), proposing to substitute Channel 276C2 for Channel 276A at Coeur d' Alene, Idaho, at the request of Idaho Broadcasting Company, Inc. (petitioner), licensee of Station KCDA(FM), Channel 276A, Coeur d' Alene. In addition, the *Notice* proposed to modify the station's license to specify Channel 276C2. Petitioner filed comments in support of the proposal.

2. We believe that the public interest would be served by allocating Channel 276C2 to Coeur d' Alene since it could provide the community with expanded FM service. The allotment can be made in compliance with the minimum distance separation requirements. Petitioner proposes to locate the transmitter 15.32 kilometers (9.52 miles) west of the city. Since Coeur d' Alene is located within 320 kilometers of the U.S.-Canadian border, we have obtained concurrence of the Canadian government for Channel 276C2 at Coeur d' Alene.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Coeur d' Alene, Idaho	272A, 276C2

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, the license of Idaho Broadcasting Company Inc., Station KCDA(FM), Coeur d' Alene, Idaho, IS MODIFIED effective **June 20, 1988,** to specify operation on Channel 276C2 in lieu of Channel 276A at Couer d' Alene, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-337

In the Matter of

Amendment of Section 73.202(b), RM-5788
Table of Allotments,
FM Broadcast Stations.
(Augusta, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1988; Released: May 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5246 (1987), proposing to substitute Channel 289C for Channel 289C1 at Augusta, Georgia, modification of the license for Station WZNY(FM) to specify operation as a Class C station, at the request of the station's licensee, Sunny Communications, Inc. (petitioner). Petitioner filed comments restating its intention to file for authority to operate as a full Class C facility.

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Augusta, in order to provide an increase in coverage by Station WZNY(FM). The substitution can be made in compliance with the minimum distance separation requirements at petitioner's proposed site 4.4 kilometers (2.7 miles) south of the city.[1] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WZNY(FM) to specify operation on Channel 289C.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below:

City	Channel No.
Augusta, Georgia	272A, 276A, 282C, 289C

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Sunny Communications, Inc., IS MODIFIED to specify operation on Channel 289C subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 289C at petitioner's restricted site are 33-26-00 and 81-57-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications

MARGARET GARZA Bakersfield, California	**MM DOCKET NO. 84-970** File No. BPH-831202AG
KERN COMMUNICATIONS COMPANY Bakersfield, California	**MM DOCKET NO. 84-971** File No. BPH-831202AX

For Construction Permit
for a New FM Station

ORDER

Adopted: April 15, 1988; Released: May 3, 1988

By the Commission:

1. Before the Commission are: (1) an Application for Review filed January 27, 1987 and corrected January 28, 1987 by Kern Communications Company (Kern); (2) an opposition thereto filed February 11, 1987 by Margaret Garza; (3) a Petition for Leave to File Supplemental Brief and Supplemental Brief in Support of Application for Review filed January 20, 1988 by Kern; and (4) an opposition thereto filed January 27, 1988 by Garza. These pleadings relate to a decision of the Review Board granting Garza's application for a new FM station in Bakersfield, California and a Memorandum Opinion and Order denying Kern's Petition for Reconsideration. 1 FCC Rcd 51 and 1294 (1986).

2. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to File Supplemental Brief filed January 20, 1988 by Kern Communications Company, IS GRANTED, and the Supplemental Brief in Support of Application for Review filed January 20, 1988 by Kern Communications Company and the opposition brief thereto filed January 27, 1988 by Margaret Garza, ARE ACCEPTED.

3. IT IS FURTHER ORDERED, That pursuant to section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review of Kern Communications Company filed January 27, 1987, and supplemented January 20, 1988, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WARMAC COMMUNICATIONS, INC. Springfield, Florida	**MM DOCKET NO. 83-1223** File No. BPH-820927AF
BIBLE BROADCASTING SYSTEMS,INC. Springfield, Florida	**MM DOCKET NO. 83-1224** File No. BPH-830215AF
MARTIN INTERMART, INC. Springfield, Florida	**MM DOCKET NO. 83-1225** File No. BPH-830215AG
BETTY F. MARTIN Callaway, Florida	**MM DOCKET NO. 83-1227** File No. BPH-830215AI

For Construction Permit
For a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1988; Released: May 3, 1988

By the Commission:

1. This matter is before us on remand from the United States Court of Appeals for the District of Columbia Circuit, which is holding in abeyance an appeal from our Memorandum Opinion and Order of August 27, 1987, 2 FCC Rcd 5318, in which we denied reconsideration of our disposition of the applications at issue. The court remanded this case at our request in order to enable us to correct a factual error in the ruling on appeal and to modify the holding accordingly. *Bible Broadcasting Systems, Inc. v. FCC*, No. 87-1513 (Nov. 30, 1987).

2. We mistakenly asserted in our opinion of August 27 that Bible Broadcasting Systems, Inc. (BBS) had received constructive notice, prior to the procedural deadline for filing major amendments in this case, that the Commission proposed to allot an FM channel to Springfield, Florida. In fact, the cut-off for major amendments antedated public notice of the proposal for channel allotment.

3. Although we hereby abandon reliance on the mistaken factual premise, we reach no different result. Our acknowledgement of this error has no bearing on the validity of our holding that taking notice of the grant of a permit to construct a new FM station after the closing of the record in this case was consistent with principles of administrative finality. Nor does the correction vitiate the principal reason that we gave for rejecting BBS's argument that taking notice of that grant was unfair. To reiterate, BBS has not persuaded us that fairness compels us to ignore matters that have a decisive bearing on the public interest in order to insure applicants against the risk of comparative disadvantage from changes in circumstance that occur as a result of the Commission's discharge of its functions while their applications remain in pendency.

4. ACCORDINGLY, IT IS ORDERED, That the last five sentences of paragraph 6, including footnote 6, of the Commission's Memorandum Opinion and Order released on August 27, 1987 in this proceeding, denying the petition for reconsideration that BBS filed on November 20, 1986, ARE DELETED as indicated herein and that such ruling IS OTHERWISE REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JEROME THOMAS LAMPRECHT Middletown, Maryland	**MM DOCKET NO. 83-985** File No. BPH-820409AB
DRAGON COMMUNICATIONS, INC. Middletown, Maryland	**MM DOCKET NO. 83-986** File No. BPH-820421AK
BARBARA D. MARMET Middletown, Maryland	**MM DOCKET NO. 83-987** File No. BPH-820908AW

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1988; Released: May 3, 1988

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM broadcast station on Channel 276A at Middletown, Maryland. In a Decision, 99 FCC 2d 1219 (1984), the Review Board affirmed the Initial Decision, 99 FCC 2d 1229 (1980), granting the application of Barbara D. Marmet (Marmet) under the standard comparative issue. Now before the Commission are Applications for Review filed January 15, 1985 by Dragon Communications, Inc. (Dragon) and January 17, 1985 by Jerome Thomas Lamprecht (Lamprecht); and Oppositions filed February 1, 1985 by Lamprecht and by Marmet. Also before the Commission are a Petition to Enlarge Issues filed May 2, 1986 by Marmet,[1] a Motion for Decision Without Regard for Female Preference, filed November 6, 1986 by Marmet,[2] and a Motion for Decision on Review, filed April 29, 1987 by Marmet. [3]

2. The Review Board granted Marmet's application finding, *inter alia*, that the enhancement credit for her female ownership, local residence and community activities, and the preference for auxiliary power, outweigh the enhancement credit awarded Lamprecht for past broadcast experience and his intention to move to Middletown, Maryland. Marmet and Lamprecht are each entitled to credit for 100 percent quantitative integration. The ALJ and the Board credited Dragon with only 76 percent integration. We agree that Marmet should be favored over Dragon because of the quantitative superiority of her integration proposal and over Lamprecht based on the enhancement credits accorded Marmet's application. See *Jerome Thomas Lamprecht*, 99 FCC 2d at 1223, 1228.

3. ACCORDINGLY IT IS ORDERED, That the Applications for Review, filed January 15, 1985 by Dragon Communications, Inc. and January 17, 1985 by James Thomas Lamprecht ARE DENIED.

4. IT IS FURTHER ORDERED, That the Petition to Enlarge Issues filed May 2, 1986 by Barbara D. Marmet, the Motion for Decision Without Regard for Female Preference, filed November 6, 1986 by Barbara D. Marmet, and the Motion for Decision on Review, filed April 29, 1987 by Barbara D. Marmet ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] On May 15, 1986 Lamprecht filed an Opposition and Marmet filed a Reply on May 27, 1986. In light of our determination herein, Marmet's request for specification of issues against Lamprecht may be dismissed as moot.

[2] Lamprecht filed comments on November 18, 1986.

[3] Dragon filed an Opposition on May 8, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-927

In re Application of

BALCONES BROADCASTING LIMITED — File No. BPCT-840711KJ

For Construction Permit
Austin, Texas

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1988; Released: May 3, 1988

By the Commission:

1. Before the Commission are: (a) Petition for Special Relief and Commission Review filed by Frontier Southwest Broadcasting, Inc. on December 3, 1987; (b) Opposition to Petition for Special Relief and Commission Review filed by Balcones Broadcasting Limited on December 18, 1987; (c) Petition for Expedited Disposition of Appeal filed by Balcones on December 18, 1987; (d) Response to Untitled Motion for Sanctions filed by Frontier on December 30, 1987; (e) Mass Media Bureau's Opposition to Petition for Special Relief and Commission Review filed January 22, 1988; and (f) Response of Frontier to Bureau's Untimely Opposition filed January 25, 1988.

2. On February 17, 1981, Frontier, not a party to this proceeding, filed an application for a low-power television station to operate on channel 55 in Austin, Texas (BPTTL-810217K7). Frontier was granted a construction permit (K55EN) on January 30, 1986.

3. On April 26, 1983, a *Notice of Proposed Rule Making* was published proposing to allocate channel 54, a full-power television frequency, to Austin, Texas. 48 Fed. Reg. 18846. On February 2, 1984, a *Report and Order* was released, assigning channel 54 to Austin. 49 Fed. Reg. 5621. On October 9, 1984, the mutually exclusive applications for channel 54 were designated for hearing. 49 Fed. Reg. 39608.

4. After grant of Frontier's construction permit, Frontier was informed by its consulting engineer that operation of an LPTV station on channel 55 would be prohibited by the Commission's rules once full-service operation began on channel 54. After the record was closed in this proceeding but before the ALJ issued his initial decision, Frontier filed a Petition for Leave to Reopen Record for Receipt of Informal Objection. The petition was denied by the ALJ because it was untimely and contrary to established Commission policy concerning the secondary status of low-power television stations relative to full-power television stations. FCC 86M-895 at ¶ 2 (Mar. 7, 1986).

5. The ALJ granted Balcones' application. FCC 86D-44 (July 8, 1986). The Review Board affirmed the ALJ's decision. 2 FCC Rcd 1984 (Rev. Bd. 1987). After the filing of applications for review by the losing parties but before any action by the Commission, the parties filed on October 15, 1987 a Joint Request for Approval of Agreements and For Dismissal of Applications, which was granted by the General Counsel pursuant to delegated authority. FCC 87I-107 (Nov. 2, 1987).

6. Frontier requests that the Commission deny all applications for channel 54 at Austin because to do otherwise would nullify Frontier's pre-existing grant of a low-power television station on channel 55. Petition for Special Relief and Commission Review at 4 ¶ 7.

7. To properly analyze Frontier's petition, it is important to note that Frontier took no action in this proceeding (other than to file an untimely informal objection) until December 3, 1987, when it filed the pleading presently before the Commission. It is clear that Frontier is not seeking review based on its informal objection. Any appeal or review rights Frontier may have had on the basis of the ALJ's denial of its informal objection were waived by its failure to file objections with the Review Board. 47 C.F.R. § 1.277.

8. Furthermore, Frontier recognizes that its argument against the allocation of channel 54 to Austin should have been made during the Rule Making process, but argues that failure to do so does not preclude it from doing so now. Petition for Special Relief and Commission Review at 4 n.3.

9. We disagree. Without addressing the question of Frontier's standing to participate in this proceeding at this late date, it is clear that its petition should be summarily dismissed. Frontier recognizes that, pursuant to 47 C.F.R. § 74.702, it is precluded from operating a low-power television station on channel 55 in Austin upon commencement of Balcones' operation on channel 54. Petition for Special Relief and Commission Review at 2 ¶ 3. Frontier has been unable to find an available replacement channel for Austin. *Id.* at 2 ¶ 4. Thus, Frontier's request for special relief can be construed only as a collateral attack on the Commission's clear, unambiguous low-power television policy. The Commission, in adopting the low-power rules, defined the new low-power television service as secondary to that of full-power stations. See *Low Power Television Service*, 51 RR 2d 476, 488 (1982). Specifically, the Commission said that "an existing low power station that would cause interference in connection with. . . a proposed new full service station is responsible for eliminating the interference, or the low power station *must cease operation.* " *Id.* at 488 ¶ 25 (emphasis added). Moreover, the Commission has stated more recently that "proposed investors in LPTV operations are given explicit, full and clear prior notice that operation in the LPTV service entails the risk of displacement." *Community Broadcasters Association*, 59 RR 2d 1216, 1217 ¶ 4 (1986). Frontier did not object to the allocation of channel 54 as a full-service outlet for Austin, and this proceeding is not the proper forum for arguments seeking to revise the Commission's low-power television policy.

10. Frontier's argument that the practical effect of nullifying a previously granted LPTV allocation is inconsistent with the fair and efficient distribution of broadcast services required by 47 U.S.C. § 307(b) is equally invalid. In refusing to allocate specific LPTV channels to particular markets, the Commission said:

> The mandates of Section 307(b) of the Communications Act are fulfilled by virtue of the fact that most channel availabilities for low power exist outside the major markets . . . . Beyond this, we do not believe that fair and efficient spectrum allocation can be furthered significantly by our engineering an elaborate allocation plan for stations that have no coverage requirements *and whose continued existence is uncertain in light of their secondary status.*

Low Power Television Service, 51 RR 2d at 490 ¶ 27 (emphasis added).

11. Finally, Frontier argues that the Commission has accommodated translator stations by conditioning full-service construction permits on the elimination of harmful interference to existing translators. See *Western Slope Communications, Ltd.*, Mimeo No. 4431 (Chief, Mass Media Bureau, May 31, 1983). Frontier's reliance on this case is misplaced. The Bureau specifically held that any interference by existing VHF translators to full-service operation of a VHF station from its proposed location would require the translators to suspend operation. *Id.* at 5 ¶ 13. Frontier mistakenly relies on another part of the decision which merely requires the full-service station to correct any incidental radiation affecting UHF translators located in close proximity to the full-service VHF transmitter site.

12. Balcones argues that Frontier's petition is devoid of merit and asks that the Commission order Frontier to pay Balcones' costs in delaying construction until the Commission completes its action on this petition. Balcones has made no showing providing a basis for grant of such a request and it is, therefore, denied.

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Special Relief and Commission Review filed December 3, 1987 by Frontier Southwest Broadcasting, Inc., IS DISMISSED and the Petition for Expedited Disposition of Appeal filed December 18, 1987 by Balcones Broadcasting Limited, IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] Consistent with the priority of other matters and the efficient disposition of the Commission's business, we have given expeditious consideration to the pleadings filed in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-177

In re Application of

NAN E. CARLISLE & JITTENDRA R. PATEL — File No. BPH-850712M6

For Construction Permit
for a New FM Station
Fargo, North Dakota

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1988; Released: May 3, 1988

By the Commission:

1. Before the Commission are: (1) a hearing designation order (HDO), *Meridian Communications*, 2 FCC Rcd 3630 (1987); (2) petitions for reconsideration filed July 20, 1987 by Q Prime, Inc. and by Howard G. Bill, and a supplement filed July 24, 1987 by Q Prime; (3) oppositions filed August 4 and 6, 1987 by the Mass Media Bureau; and (4) replies filed August 17, 1987 by Q Prime, and August 24, 1987 by Bill.

I. BACKGROUND

2. Q Prime and Bill seek reconsideration of the HDO in this proceeding. In that order, the Bureau dismissed the applications filed by Q Prime and by Bill for a construction permit for new FM facilities at Fargo, North Dakota. After Q Prime's application had been inadvertently accepted for filing, it was dismissed because of irreconcilable inconsistencies in Q Prime's geographic coordinates. Q Prime argues that the error in its application is insignificant, that the Bureau should have considered an amendment correcting its geographic coordinates, and that it was prejudiced by the Bureau's delay in dismissing its application.

3. Similarly, Bill's application was returned because it did not meet the minimum requirements for a Class C FM station specified in 47 C.F.R. § 73.211(a). Bill argues that his application conforms with the Commission's requirements.

II. DISCUSSION

4. *Q Prime's Geographic Coordinates* : Q Prime argues that the inconsistencies in the geographic coordinates listed in its application are insignificant. The error constitutes a deviation of only 97 feet north and 317 feet west. Q Prime asserts that either set of coordinates shown in its application complies with the Commission's technical requirements for FM stations.

5. Q Prime's application was dismissed pursuant to the "hard look" policy for accepting FM applications. *FM Application Processing*, 58 RR 2d 776 (1985); *Statement of New Policy Regarding Commercial FM Applications that are Not Substantially Complete or are Otherwise Defective* (Appendix D), 58 RR 2d 166 (1985). Under the "hard look" policy, applicants are required to show their proposed geographic coordinates to the nearest second, and if there are inconsistencies in engineering data which cannot be resolved on the face of an application, the application will be returned or dismissed. 58 RR 2d at 167-69. Granting exceptions would require the staff to examine individual applications to determine the significance of the inconsistent data and would detract from the efficiencies in processing to be achieved from the "hard look" policy. We agree with the Bureau that Q Prime's failure to specify geographic coordinates accurate to the nearest second was critical to processing its application. Thus, the Bureau properly dismissed Q Prime's application.

6. *Timeliness of Q Prime's Amendment* : Applications which are found acceptable for tender, are placed on a Notice of Tenderability. Applicants have a 30-day period to amend their applications as of right after a Notice of Tenderability is issued. *FM Application Processing*, 58 RR 2d at 784 ¶ 31. If a petition for reconsideration of the dismissal of an application as non-tenderable is granted and the application is found tenderable, a further Notice of Tenderability is issued, triggering a new 30- day period in which all mutually exclusive applicants would be allowed to amend their applications. *FM Application Processing* (Reconsideration), 59 RR 2d 100, 102 ¶ (1985).

7. Q Prime filed its application on July 12, 1985, and a notice of its tenderability was issued on December 30, 1985. On February 3 and 11, 1986, the Bureau issued notices showing that two mutually exclusive applicants for facilities at Fargo had filed petitions for reconsideration of the dismissal of their applications for failure to comply with the Commission's acceptability criteria. On March 4, 1986, Q Prime filed an amendment correcting its geographic coordinates. Q Prime argues that its March 4 amendment should be considered because it was filed within 30 days of the February 3 and 11 notices.

8. This proceeding was not designated for hearing until June 18, 1987. Q Prime argues that consideration of its amendment would not have delayed this proceeding or disrupted the Commission's processes, because the amendment was filed before this proceeding was designated for hearing. It also asserts that because its application was dismissed for nonacceptability, rather than for a tenderability defect, it can be cured by timely amendment.

9. Q Prime's arguments are without merit. The Commission adopted the "hard look" procedures in the interest of expeditiously authorizing new service and it "will place applications found to be tenderable on Notice of Tenderability as soon as possible." 59 RR 2d at 102 ¶ 6. The Commission recognized that applicants with nontenderable applications could file for reconsideration, but it said:

> Rather than withhold all tenderable applications from appearing on a Public Notice until the disposition of initially nontenderable applications has become final, we will continue to place tenderable applications on Public Notice promptly. In the interest of fairness to all applicants, however, whenever the Commission reinstates an application, or for any

> other reason subjects a mutually exclusive application to a late amendment period, all applicants mutually exclusive with that application will be afforded the opportunity to file during the later amendment period.

Id. This procedure allows the processing of tenderable applications to go forward without disruption while the Commission considers tenderability determinations of mutually exclusive applications. It also ensures that all tenderable applications will be provided with an equal opportunity to file perfecting amendments.

10. Q Prime argues that it should be allowed to amend its application because the Commission reconsidered acceptability rulings involving mutually exclusive applicants. The "hard look" procedures, however, only provide for a late amendment period after reconsideration of a nontenderability ruling or after a mutually exclusive applicant is granted a late amendment. 59 RR 2d at 102 ¶ 6. It is only after the Commission determines that an application is tenderable that it begins its more detailed acceptability review. Applicants have 30 days after tenderability to correct acceptability defects, and they are expected to correct those defects during that amendment period. We specifically considered and rejected the concept of allowing curative amendments because permitting "curative amendments after that period poses too great a threat to the orderly functioning of our new processing procedures." *FM Application Processing*, 58 RR 2d at 785 ¶ 32. The Bureau properly refused to accept Q Prime's amendment after the February 3 and 11 notices, because those notices concerned acceptability determinations as opposed to tenderability rulings.

11. Q Prime's argument that its application was dismissed for an acceptability defect instead of a tenderability defect also lacks merit, because voluntary amendments curing acceptability defects will only be accepted within 30 days of the issuance of the Notice of the applications' tenderability -- here December 30, 1985, which is more than 30 days prior to March 4, 1986.

12. Q Prime's further contention -- that its amendment should be accepted because it was filed before designation -- must also be rejected. We limited the period for amendments in order to expedite our processing procedures. Allowing amendments up to the time of designation "poses a threat to the orderly functioning of our new processing procedures." 58 RR 2d at 785 ¶ 32.

13. *Delay in Dismissing Q Prime's Application* : Q Prime filed its application in July 1985. It asserts that, from December 1985 until its application was dismissed in June 1987, it believed its application was acceptable for filing. Q Prime argues that the Commission's delay in acting on its application precluded it from allocating its resources to other endeavors. We reject Q Prime's argument. The proximate cause of any detriment suffered by Q Prime is the error in its application -- not the Commission's processing practices. This argument provides no basis for special treatment of Q Prime's application in this proceeding.

14. *Bill's Compliance with the Commission's Rules* : In Docket 80-90 the Commission held that all Class C facilities must have an antenna with minimum height above average terrain (HAAT) of 300 meters (984 feet). *Modification of FM Broadcast Station Rules* (Report and Order), 94 FCC 2d 152, 156 (1984); 47 C.F.R. § 73.211(a)(2). It also established new categories of Class C1 and C2 stations, which would permit existing stations to operate with less than full Class C facilities. *Id.* New Class C stations must meet the prescribed minimum standards. *Id.* Existing stations must modify their facilities within three years to meet minimum Class C requirements or, in the alternative, to elect to be reclassified as a C1 or C2 station with lesser facilities. *Id.*

15. Bill argues that his application should be accepted as substantially complete because he specified facilities for a Class C1 FM station. He asserts that the Report and Order established new classes of FM stations, but did not specifically require new applicants to specify full Class C facilities. Thus, he concludes that the Report and Order failed to provide notice that his application was required to specify facilities which would comply with the minimum requirements for Class C facilities.

16. In Docket 80-90 the Commission found "that there exists a substantial demand for new FM service that cannot be satisfied under existing rules." 94 FCC 2d at 161 ¶ 23. To meet this demand, it sought to provide a more efficient use of the spectrum by requiring higher minimum antenna heights. *Id.* at 156 ¶ 10. New Class C stations were "required immediately to meet minimum facilities" standards. *Id.* C1 and C2 stations were authorized to operate with lesser facilities and serve smaller service areas. *Id.* at 155-56 ¶ 10. The Commission recognized that many stations are "operating at less than 'full' facilities" because of Commission regulations and other governmental limitations, and it afforded those existing stations three years to specify minimum facilities or be reclassified. *Id.* at 176-78 ¶¶ 65,70.

17. The Commission specifically considered whether *new* applicants should be allowed to specify lesser facilities. *Id.* at 177 ¶ 67. It concluded that "any group seriously contemplating new Class C service station should have good economic support and be able to begin operations with the larger facilities." *Id.* at 178 ¶ 69. Finally, the Report and Order made clear that the C1 and C2 classifications were authorized in recognition of the restrictions and limitations on existing stations and that all new applicants were required to meet the minimum Class C facility requirements. Thus, the Bureau was correct in ruling on Bill's application that the Report and Order provided no basis for filing a Class C1 application.

18. The HDO cited two public notices clarifying the new processing procedures. *Clarification of FM Processing Procedures* (Mar. 27, 1984) and *Further Clarification of FM Processing Procedures* (July 24, 1984), both published at 51 Fed. Reg. 26009 (July 18, 1986). Bill argues that the public notices were not published in the Federal Register until after he filed his application and that the Bureau's reliance on the notices in dismissing his application was therefore improper. However, in view of our finding that Bill's application was properly dismissed for failure to comply with the requirements of the Report and Order, we need not consider the subsequent issuance of the public notices.

19. *Applicability of Section 73. 202 (a) (2)* : Licensees were afforded three years to upgrade their facilities or be reclassified. The Commission stated "that licensees can protect their classification merely by filing an application to upgrade their facilities." *Id.* at 178 ¶ 69. The Commission stressed that "[i]t is not necessary that the application be granted or the construction be completed by the deadline date." *Id.* After the three-year period for improvement of existing facilities, the Commission will issue a new

Table of Assignments reflecting "the facilities authorized or those for which an application has been filed." *Id.* at 178 ¶ 70. These policies were implemented by 47 C.F.R. § 73.202(a)(2), which reads:

> Each channel listed in the Table of Allotments reflects the class of station that is authorized, or has an application filed, to use it based on the minimum facility requirements for each class contained in Section 73.211.
>
> Note: The provisions of this paragraph [(a)(2) of this section] become effective [3 years from the effective date of the Report and Order in BC Docket 80-90].

20. Bill argues that it "has an application filed," and thus under section 73.202(a)(2) the frequency for which it applied is eligible for inclusion in the new Table of Assignments as a C1 channel. We do not agree. The note following section 73.202(a)(2) makes clear that the provision does not become effective until three years after the effective date of the Report and Order and that the provision applies only to applications filed by existing stations. The Report and Order allowed existing stations three years to upgrade facilities or be reclassified. New stations, on the other hand, are required to comply immediately. The rule merely provides that the Commission will issue a new Table of Assignments after existing stations have upgraded their facilities or been reclassified. Nothing in section 73.202(a)(2) authorizes new applicants to file for less than full Class C facilities. Therefore, Bill's application was properly dismissed.

21. ACCORDINGLY, IT IS ORDERED, That the Petitions for Reconsideration filed July 20, 1987 by Q Prime, Inc. and by Howard G. Bill, and suplemented on July 24, 1987 by Q Prime, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-216

In re Applications of

MARLIN BROADCASTING OF CENTRAL FLORIDA, INC. *et al.* — File No. BPCT-850319KF

For Construction Permit for a New Television Station
Orlando, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 21, 1988; Released: May 3, 1988

By the Commission:

1. Before the Commission are: (a) Application for Review filed by Marilynn J. Craig on May 11, 1987 and (b) Opposition to Application for Review filed on May 26, 1987 by Central Florida Television, Ltd.

2. During cross-examination of Craig at a hearing session held on October 15, 1986, a question arose as to the availability of Craig's proposed transmitter site. Tr. at 3217-19. Consequently, Administrative Law Judge John M. Frysiak (ALJ), designated a site availability issue against Craig. This ruling was confirmed by his *Order*, FCC 86M-3096 (Oct. 20, 1986), which established the procedural schedule for this issue. On January 14, 1987, during the hearing session at which the site availability issue was to be tried, Central Florida made an oral motion to dismiss Craig's application for failure to prosecute.

3. The ALJ thereupon issued a bench ruling, subsequently memorialized by *Memorandum Opinion and Order*, FCC 87M-120 (Jan. 16, 1987), granting Central Florida's oral motion based upon (1) the failure of Craig to exchange her direct case, (2) the failure of Craig or her counsel to appear at the hearing on the site availability issue after counsel for Central Florida notified Craig and discussed with Craig's counsel the necessity for Craig's appearance for cross-examination, and (3) the fact that neither Craig nor her counsel had appeared at any time since the further scheduled hearings began on January 5, 1987. Craig appealed that ruling, but it was affirmed by the Review Board. 2 FCC Rcd 2025 (Rev. Bd. 1987).

4. The sole issue raised by Craig, both to the Board and to the Commission, is whether an application may be dismissed without providing an opportunity to the applicant to file an opposition. Craig has presented no explanation for her failure to comply with the ALJ's October 20, 1986 order.

5. As the Commission has stated previously, new service should be provided to the public in the most efficient, expeditious manner possible. To this end, ALJs must be given broad discretion to regulate the course of multiparty comparative hearings, including the discretion to insist upon timely compliance with ALJs' orders. *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶¶ 2, 3 (1986). In *Hillebrand*, the Commission affirmed an ALJ's grant of a motion to dismiss for failure to prosecute based on numerous failures to meet procedural deadlines, including the failure to respond to a motion to dismiss. *Id.*

6. Craig objects to the ALJ's ruling because the motion to dismiss and the ruling were made orally, with no opportunity for Craig to file an opposition. However, the Board found that the ALJ's issuance of a bench ruling on an oral motion to dismiss based on Craig's failure to demonstrate even minimum diligence in prosecuting her application was neither novel nor to be discouraged. 2 FCC Rcd at 2025 ¶ 5. In a similar case, where no written motion to dismiss had been filed, the Board has ruled that the ALJ did not abuse his discretion by dismissing the application with prejudice for failure to meet a written case exchange date. *Mad River Broadcasting Co., Inc.*, 97 FCC 2d 679, 681 ¶ 4 (Rev. Bd. 1984).

7. Nonetheless, on October 29, 1987, the General Counsel requested Craig to submit a statement disclosing Craig's reasons for her failure to comply with the ALJ's October 20, 1986 order. Craig's submission was to have been filed within 30 days of the date the order was released. Though personally served, Craig has yet to file any statement pursuant to the General Counsel's order. Failure to respond to official correspondence or request for additional information is cause for dismissal. 47 C.F.R. § 73.3568(b).

8. On the basis of the record before us, Craig's application for review will be denied. We agree with the Board that, based on Craig's lack of participation in the hearing, it was not unreasonable for the ALJ to dismiss her application. 2 FCC Rcd at 2025 ¶ 5. We disagree with Craig's argument that motions to dismiss must, in all instances, be in writing with an opportunity to respond. See *Hillebrand*, 1 FCC Rcd at 419 ¶ 3. Furthermore, we find no merit in Craig's argument that the Commission violated her rights by requiring her to compress her substantive opposition to the motion to dismiss into the same five pages allowed by 47 C.F.R. § 1.301(c)(3) for her appeal from the procedural ruling which resulted in her dismissal. Craig was personally served and provided with the opportunity to state her reasons for her actions and has not done so.

9. The Commission has gone the extra mile, giving Craig more process than she is probably due under the law. See 5 U.S.C. §§ 554(b), 554(c). The risk that Craig will be erroneously deprived of some private interest through the procedures we have used is very remote; and the value of providing her additional procedural safeguards appears to be nil, given that she has failed to respond to the General Counsel's Order of October 29, 1987. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). On the other hand, the burden to the Commission -- and especially to our objective of providing communications services to the public in the most efficient, expeditious manner possible -- would be substantial if we had to provide Craig additional or substitute procedures on top of those that she has already been afforded. *Id.* See also

Sutton v. City of Milwaukee, 672 F.2d 644, 645-46 (7th Cir. 1982). In view of the foregoing, we find no error in the rulings below.

10. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed May 11, 1987 by Marilynn J. Craig, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-124

In the Matter of

Amendment of Section 73.202(b), RM-6073
Table of Allotments,
FM Broadcast Stations.
(Moss Point, Mississippi and
Jackson, Alabama)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 21, 1988; Released: May 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is a petition for rule making filed by Jackson County Broadcasters, Inc., (petitioner), requesting the substitution of FM Channel 285C2 for Channel 285A at Moss Point, Mississippi. Petitioner also requests modification of its license for Station WKKY(FM), to specify operation on the higher class channel.

2. Channel 285C2 can be allocated to Moss Point, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 285A is deleted from Jackson, Alabama. Petitioner has proposed the substitution of Channel 276A for 285A at Jackson. We instead propose substitution of Channel 233A to avoid a conflict with a new rule making proceeding to upgrade Channel 276A to 276C2 at Ocean Springs, Mississippi (RM-6316). The proposed substitution at Jackson can be accomplished in compliance with the minimum distance separation requirements at the current site of Station WHOD. Thus we shall issue an *Order to Show Cause* to Vogel-Ellington Corporation, the licensee of Station WHOD. It is also necessary to impose a site restriction 23.4 kilometers east on Channel 285C2 at Moss Point.[1] The site restriction will prevent a conflict with a pending rule making (Docket 86-381) to add Channel 285A to Folsom or Bogalusa,[2] Louisiana. Since 285C2 is an adjacent channel upgrade the modification at Moss Point could take place in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require that the proponent of the new allotment make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner failed to do so in its petition for rule making and should do so in comments filed in response to this *Notice*.

4. In view of the fact that the proposed allotment could provide a first wide coverage area station at Moss Point, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Jackson, Alabama	285A	233A
Moss Point, Mississippi	285A	285C2

5. IT IS ORDERED, That pursuant to Section 316 of the Communications Act of 1934, as amended, Vogel-Ellington Corp., licensee of Station WHOD, Jackson, Alabama, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 233A in lieu of Channel 285A.

6. Pursuant to Section 1.87 of the Commission's Rules, Vogel-Ellington Corp. may, not later than **June 24, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. The Commission may call on Vogel-Ellington Corp. to furnish additional information. If Vogel-Ellington Corp. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Vogel-Ellington Corp. will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Order to the following:

William R. Vogel, Jr.
President, Vogel-Ellington Corp.
Station WHOD
Box 518
Jackson, Alabama 36545

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **June 24, 1988,** and reply comments on or before **July 11, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

C. Wayne Dowdy
President, Jackson County Broadcasters, Inc.

P. O. Box 1789
Pascagoula, Mississippi 39567

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commisison specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 285C2 at Moss Point are 30-20-58, 88-16-00.

[2] *See* 1 FCC Rcd 209 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-177

In the Matter of

Amendment of Section 73.202(b), RM-6164
Table of Allotments,
FM Broadcast Stations.
(Ellensburg, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 7, 1988; Released: May 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of KXLE, Inc. (petitioner), licensee of Station KXLE-FM, Channel 237A, Ellensburg, Washington, the Commission considers herein a petition for rule making seeking the substitution of Channel 237C2 for Channel 237A and modification of its license to specify operation on the higher class co-channel. Petitioner submitted information in support of its proposal.

2. The substitution can be made consistent with the Commission's minimum separation requirements at the petitioner's current transmitter site.[1] Since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence must be obtained from the Canadian government.

3. As requested, we shall propose to modify the license of Station KXLE-FM to specify operation on the higher class co-channel, Channel 237C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Ellensburg.

4. The Commission believes it is in the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Ellensburg, Washington	237A, 276A	237C2, 276C2[2]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 24, 1988,** and reply comments on or before **July 11, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Richard M. Riehl, Esquire
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates are 47-00-00 and 120-31-40.

[2] Currently pending before the Commission in MM Docket No. 87-452 is a proposal to substitute Channel 276C2 for Channel 276A at Ellensburg, Washington.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-178

In the Matter of

Amendment of Section 73.202(b), RM-6118
Table of Allotments,
FM Broadcast Stations.
(Kremmling, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Grand Lake Broadcasting, Inc. (petitioner), licensee of Station KTLD-FM (Channel 292A), Kremmling, Colorado, has filed a petition for rule making seeking the substitution of Channel 292C2 for Channel 292A and modification of its license accordingly to specify the higher power channel.

2. We believe the petitioner's proposal merits consideration since it could provide a first expanded coverage FM service to Kremmling. A staff engineering analysis has determined that although petitioner expressed a desire to utilize its present site to accomplish its modification proposal, that location is short spaced to a rule making proposal to allot Channel 291A to Basalt, Colorado (RM-5957), as a first local service. However, the deficiency can be resolved consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the petitioner's transmitter is relocated to an area at least 2.3 kilometers (1.4 miles) northeast[1] of the community.

3. Although petitioner requested the issuance of an *Order to Show Cause* in connection with its modification request, such action is not required. Rather, in accordance with established Commission policy, we shall propose to modify the license of Station KTLD-FM, as requested by petitioner, in the event Channel 292C2 is substituted for Channel 292A at Kremmling, Colorado. Moreover, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the proposed use of Channel 292C2 at Kremmling.

4. In view of the above, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Kremmling, Colorado, in the following respect:

	Channel No.	
City	Present	Proposed
Kremmling, Colorado	292A	292C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 24, 1988,** and reply comments on or before **July 11, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert L. Olender, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, NW
Suite 203
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the pubic are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates at the restricted site are as follows: 40-04-58; 106-22-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-179

In the Matter of

Amendment of Section 73.202(b), RM-6034
Table of Allotments,
FM Broadcast Stations.
(Eufaula, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Paul H. Reynolds and Virgle Leon Strickland (petitioners), have filed a petition for rule making seeking the allotment of Channel 250A to Eufaula, Alabama, as that community's second local FM service. Petitioner states that it will apply for the channel if it is ultimately allotted, as requested.

2. A staff engineering study has determined that Channel 250A can be allotted to Eufaula, Alabama, in conformity with the minimum distance separa- tion requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is sited in an area at least 6.2 kilometers (3.8 miles) north[1] of the community. The restriction is required to avoid short spacing to Station WJAD(FM) (Channel 247C), Bainbridge, Georgia, as well as to a rule making proposal to allot Channel 249A to Ariton, Alabama (RM-6033).

3. In light of the foregoing, and since the instant proposal could provide an additional local FM broadcast service to Eufaula for the expression of diverse viewpoints and programming, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.207(b) of the Commission's Rules with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Eufaula, Alabama	224A	224A,250A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 24, 1988,** and reply comments on or before **July 11, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Paul H. Reynolds
415 N. College Street
Greenville, AL 36037

Virgle Leon Strickland
P.O. Box 116
Enterprise, AL 36331-0116

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the pubic are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates of the restricted site are North Latitude 31-56-56, West Longitude 85-08-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-394

In the Matter of

Amendment of Section 73.202(b), RM-5963
Table of Allotments,
FM Broadcast Stations.
(Lancaster, New Hampshire)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1988; Released: May 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Maurice B. Polayes (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5935 (1987), proposing the allocation of Channel 272A to Lancaster, New Hampshire, as the community's first local FM service. Petitioner filed comments and a "Supplement" to the comments reiterating his intention to apply for the channel, if allocated.[1] No other comments were received.

2. Channel 272A can be allocated to Lancaster in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.3 kilometers (2.1 miles) northeast to avoid a short-spacing to Station WCVR-FM, Channel 272A, Randolph, Vermont. Concurrence by the Canadian Government has been received since Lancaster is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 17, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lancaster, Hew Hampshire	272A

4. The window period for filing applications will open on **June 20, 1988,** and close on **July 20, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In his comments, petitioner withdrew his interest in use of Channel 272A at Lancaster based on the authorization of a fulltime AM station to the community. However, in his "Supplement," he states that he desires to pursue the provision of an FM service to the community regardless of the existence of the AM station. This "Supplement" was timely filed prior to the close of the record herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-499

In the Matter of

Amendment of Section 73.202(b), RM-6053
Table of Allotments,
FM Broadcast Stations.
(Henderson, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1988; Released: May 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Tia A. Soliday (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6857 (1987), proposing the allocation of Channel 264A to Henderson, New York, as the community's first local FM service. Petitioner filed comments reiterating her intention to apply for the channel, if allocated.[1] No other comments were received.

2. Channel 264A can be allocated to Henderson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence in the allotment has been received since Henderson is located within 320 kilometers (200 miles) of the U.S.- Canadian border.

3. We believe the public interest would be served by allocating Channel 264A to Henderson since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 17, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Henderson, New York	264A

4. The window period for filing applications will open on **June 20, 1988,** and close on **July 20, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's late-filed comments will be accepted for the purpose of expressing continuing interest.

[2] The coordinates for this allotment are North Latitude 43-50-49 and West Longitude 76-10-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-009-LA

Application for authority to participate in the launch of the INTELSAT V-A (F-13)

ORDER AND AUTHORIZATION

Adopted: April 22, 1988; Released: May 3, 1988

By the Acting Chief, International Facilities Division:

1. The Commission has under consideration application CSS-87-009-LA filed by Communications Satellite Corporation (Comsat) on March 31, 1987, and updated on March 23 and April 22, 1988, for authority to participate in the launch, positioning and in-orbit testing of the modified INTELSAT V-A (F-13) satellite.

2. The application was listed in the Commission's Public Notice of Applications Accepted for Filing dated April 8, 1987. No comments were received.

3. The modified INTELSAT V-A (F-13) was delivered to the launch site in Kourou, French Guiana, on March 28, 1988, and is scheduled to be launched on May 14, 1988, utilizing an Ariane 2 launch vehicle. This satellite will be positioned at a nominal location of 307 degrees East Longitude in the Atlantic Ocean Region (AOR). It will replace the INTELSAT V (F-3) and will provide expanded Ku-band West spot beam coverage of the U.S. and Canada. In addition, the F-13 will provide high effective isotropic radiated power (e.i.r.p.) C-band spot beam coverage of South America. The F-13 is being launched out of sequence, after F-14 which was destroyed during launch in May 1986. It is anticipated the the F-13 will be in service by August 1988.

4. The costs associated with the modified INTELSAT V-A (F-13) are as follows:

(all amounts in real year dollars)	
FACC Contract (including delivery price, engineering charges and amendments)	49,596,439
Performance incentives, capitalized	1,489,194
Performance incentives, expensed	13,402,746
FACC Launch Support	1,199,561
Arianespace Launch Vehicle and services	36,887,355
Insurance (liability, launch and in-orbit failure)	6,136,908
TOTAL INTELSAT	108,712,203
TOTAL COMSAT (based on new 3/1/88 ownership share of 26.415565%)	28,716,943

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest will be served by a grant of the subject request. Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT V-A (F-13) satellite to be positioned at 307 degrees East Longitude over the Atlantic Ocean, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT V-A (F-13) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-389

In the Matter of

Revision of Part 15 of the rules regarding the operation of radio frequency devices without an individual license	RM-5193 RM-5250 RM-5575

ORDER EXTENDING TIME TO FILE REPLY COMMENTS

Adopted: April 25, 1988; Released: May 3, 1988

By the Chief Engineer:

1. A Notice of Proposed Rule Making in the above entitled proceeding, FCC 87-300, was adopted by the Commission on September 17, 1987, and released on October 2, 1987. Comments in this proceeding were due March 7, 1988. Reply comments are due May 9, 1988.

2. Since release of the Notice, the Consumer Electronics Group of the Electronic Industries Association, the American Council of Independent Laboratories, the Door Operator and Remote Controls Manufacturers Association, and the Chamberlain Group, Inc. have filed Motions for Extension of Time for the filing of reply comments with the Commission. These petitions expressed basically the same opinion. Due to the extremely complex technical issues involved in this proceeding, the large number of commenting parties and the late filed comments by the U. S. Department of Commerce/National Telecommunications and Information Administration (DOC/NTIA), 60 days additional time is needed to adequately analyze and reply to the comments filed in this proceeding.

3. In addition to the above four petitions, the Linear Corporation (Linear) has requested that the Commission issue a Further Notice of Proposed Rule Making in the above entitled proceeding. Alternatively, Linear requested that the Commission extend the period for filing reply comments until June 7, 1988.

4. The decision as to whether to release a Further Notice of Proposed Rule Making or a Report and Order cannot be made by the Commission until all of the comments and reply comments have been received and analyzed. Thus, the petition from Linear is premature and must be denied. However, because of the technical nature of this proceeding, our desire to have a fully developed record before us, and, in particular, the late filing by DOC/NTIA, it is believed that the concerns of the commenters can be resolved by extending the reply comment date by 30 days. Accordingly, *IT IS ORDERED*, pursuant to the authority contained in 47 CFR 0.241(a)(5), that the period of time for the filing of reply comments *IS EXTENDED* until June 8, 1988. *IT* IS FURTHER ORDERED, pursuant to the authority contained in 47 CFR 0.241(a)(1), that the request from Linear to issue a Further Notice of Proposed Rule Making is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-203

In re Applications of	
ROBIN B. THOMAS	File No. BPH-860707MU
RAYMARK BROADCASTING CO., INC.	File No. BPH-860707NF
LAUREL MEDIA, INC.	File No. BPH-860707NG
JOSEPH "DON" POWERS	File No. BPH-860707NK

For Construction Permit
For a New FM Station at
Curwensville, Pennsylvania
Channel 275A (102.9 MHz)

HEARING DESIGNATION ORDER

Adopted: April 21, 1988 **Released: May 5, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 26, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-204

In re Application of

AGH COMMUNICATIONS, INC. (hereafter AGH) File No. BPH-870430MX

WOODFORD COUNTY RADIO, INC. (hereafter Woodford) File No. BPH-870430MY

For a Construction Permit for a
New FM Station on Channel 253A,
Eureka, Illinois

HEARING DESIGNATION ORDER

Adopted: April 21, 1988; Released: May 5, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and AGH have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by AGH would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
AGH	July 29, 1987, February 18, 1988, and March 10, 1988

4. Data submitted by the applicants indicates there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applicants ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: AGH

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: AGH

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themeselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 26, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-201

In re Applications of

CHARLES E. PHILLIPS (hereafter Phillips)	File No. BPH-870105MC
OLIVER SPRINGS RADIO FM LIMITED PARTNERSHIP (hereafter Limited Partnership)	File No. BPH-870107MJ
RANDALL K. WELLS (hereafter Wells)	File No. BPH-870107MD (PREVIOUSLY DISMISSED)

For a Construction Permit for a New
FM Station on Channel 254A
Oliver Springs, Tennessee

HEARING DESIGNATION ORDER

Adopted: April 21, 1988; Released: May 5, 1988

By the Chief, *Audio Services Division:*

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* Wells' application was returned as unacceptable for filing on November 19, 1987, after preliminary study revealed that the geographic coordinates specified in the application did not match the coordinates plotted on the 7.5 minute U.S.G.S. topographic site map. On December 21, 1987, Wells filed a petition for reconsideration which included an amended application with the coordinates of the transmitter site correctly plotted. Wells' petition contended that the coordinates originally shown on the 7.5 minute map were incorrectly plotted due to a technical error in duplication, and requested that his amended application be reconsidered. Phillips filed an opposition to Wells' petition for reconsideration on January 14, 1988.

3. In order to be favorably considered, a petition for reconsideration must establish that the action taken by the Commission or designated authority from which reconsideration is sought involved findings of fact or conclusions of law which were erroneous. *See* 47 C.F.R. § 1.106(d)(2). Wells' petition fails to establish that such errors were made. Rather, the instant petition relies upon the submission of an amendment aimed at correcting the deficiency for which the original application was correctly returned. Because Wells failed to meet the criteria necessary for favorable action, Wells' petition for reconsideration must be denied. *See , e. g., Ann D. Genthner*, 2 FCC Rcd 399 (1986).

4. *Other* matters. In his response to FCC Form 301, Section II, Item 6(a), Phillips reported that he is the General Manager of WYSH (AM), Clinton, Tennessee, and that he pledges to resign this position upon grant of the proposed Oliver Springs, Tennessee station. Accordingly, an appropriate condition will be specified below.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 C.F.R. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That for the reasons stated in paragraphs 2-3 hereinabove, the petition for reconsideration filed by Wells IS DENIED.

9. IT IS FURTHER ORDERED, That in the event of a grant of the Phillips application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein, the permittee shall certify to the Commission that its principal, Charles E. Phillips, has resigned the position of General Manager of WYSH(AM), Clinton, Tennessee.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **May 26, 1988,** file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-202

In re Applications of

WMHT EDUCATIONAL TELECOMMUNICATIONS, INC.
(hereafter: WMHT)
Poughkeepsie,
New York, Channel 204B1 — File No. BPED-860908PD

STATE UNIVERSITY OF NEW YORK
(hereafter: SUNY)
New Paltz, New York,
Channel 204A — File No. BPED-861124ML

For a Construction Permit for
a New Noncommercial Educational
FM Station

HEARING DESIGNATION ORDER

Adopted: April 21, 1988; Released: May 5, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station.

INDIVIDUAL APPLICANTS

2. *WMHT. Air Hazard.* WMHT indicates that it intends to mount its antenna on an "existing tower" at coordinates 41' 43' 09" North Latitude and 73' 59' 4 9 " West Longitude. The Commission's Antenna Survey Branch, however, finds that the coordinates specified in WMHT's application for the existing tower do not match the coordinates currently listed in its records, which were corrected to 41' 43' 09" North Latitude and 73' 59' 4 7 " West Longitude on June 11, 1986, by WEOK Broadcasting Corporation, licensee of WPDH(FM), Poughkeepsie, New York. WMHT was informed of this by letter on April 20, 1987 (Ref. No. 8920-AED) and was instructed to either refile with the FAA, if it believed its application to be correct, or correct all pertinent sections of its application. To date, WMHT has taken no action with respect to this matter. Since the FAA cannot make a determination as to whether the antenna proposed by WMHT would constitute a hazard to air navigation until the correct location of the tower is identified, an issue with respect thereto will be specified and the FAA made a party to the proceeding.

3. *Main Studio.* 47 C.F.R. § 73.1125 requires that the main studio of an FM station be located within the station's proposed 3.16 mV/m (70 dBu) contour, but that on a showing of good cause may be located outside that contour. WMHT states in its response to Item 12, Section V-B, Form 340, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the pertinent contour. Under these circumstances, the applicant will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the 3.16 mV/m contour or an appropriate issue will be specified by the Judge.

4. *SUNY. Pending Lawsuits In Re Employment Discrimination Matters.* SUNY has indicated that several proceedings are being litigated in which the University has been charged with employment discrimination. Three judicial proceedings are pending: (i) *Ottaviani v. State University of New York at New Paltz*, 77 Civ 6259 USDC SDNY (Judge Kram), a Title VII class action brought by female, fulltime academic employees alleging sex discrimination in employment; (ii) *Adelson v. State University of New York College at New Paltz*, 83 Civ 1558 USDC SDNY (Judge Cholakis), a Title VII action brought by an Orthodox Jewish professor alleging that the University's requirement that he teach a course from 10-11 a.m. on Friday violated his religious belief by preventing him from returning to his distant home before commencement of the Sabbath; and (iii) *Rodriguez v. Chandler*, 85 Civ 9749 USDC SDNY (Judge Weinfield), a Title VII, Section 1983 suit brought by a Hispanic professor who was denied tenure. In addition, SUNY has indicated that a number of administrative complaints are pending. Several complaints filed by professors before the State Division of Human Rights (SDHR) and the Equal Employment Opportunities Commission are being held in abeyance pending determinations in the *Ottaviani* and *Rodriguez* cases. Also pending are the cases of Susan Puretz, Case Nos. 3-E585-92056E, 3-E085-107793E, in which Associate Professor Puretz alleges that she was denied a promotion to professor because of her sex and later retaliated against because she filed a SDHR complaint. SUNY denies the charges in each instance. An appropriate condition will be specified.

OTHER MATTERS

5. *Share - time Arrangement.* The applicants have indicated that they have discussed and rejected the concept of a share-time arrangement. Nonetheless, an issue will be specified to determine whether a share-time arrangment between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

6. *307 (b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. § 307(b) which of the proposals would better

provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

7. *Areas and Populations*. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

8. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: WMHT

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms an conditions thereof; and (c) in light of 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. § 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That WMHT shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 340, and, if appropriate, a showing of good cause if its respective main studio will be located outside the 3.16 mV/m contour.

12. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to SUNY as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate as a result of the outcomes in the cases noted in Paragraph 4 herein.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **May 26, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-186

In the Matter of

Amendment of Section 73.202(b), RM-6246
Table of Allotments,
FM Broadcast Stations.
(Prairie du Chien, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. Prairie Broadcasting Company (petitioner), licensee of Station WPRE-FM, Channel 232A, Prairie du Chien, Wisconsin, has filed a petition for rule making seeking the substitution of Channel 232C2 for Channel 232A and modification of its license to specify operation on the higher class co-channel. Petitioner submitted information in support of its proposal. The substitution can be made consistent with the Commission's minimum separation requirements.[1]

2. We believe the proposal warrants consideration. As requested, we shall propose to modify the license of Station WPRE-FM to specify operation on the higher class co-channel, Channel 232C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Prairie du Chien.

3. The Commission believes it is in the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Prairie du Chien, Wisconsin	232A	232C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 27, 1988,** and reply comments on or before **July 12, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

W. C. Schlaugat, Jr. President
Prairie Broadcasting Company
P. O. Box 90
Prairie du Chien, WI 53821
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] In order to protect all of the applications filed for vacant Channel 232A at Tomah, Wisconsin, the proposal requires a site restriction of 0.6 kilometers (0.4 miles) southwest of the city. The coordinates for the proposed site are 43-02-49 and 91-08-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-185

In the Matter of

Amendment of Section 73.202(b), RM-6288
Table of Allotments,
FM Broadcast Stations.
(Montgomery, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Upper Kanawha Valley Broadcasters, Inc. (petitioner), the Commission considers herein a petition for rule making seeking the allocation of Channel 227A to Montgomery, West Virginia, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 227A can be allotted to Montgomery in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.5 kilometers (4 miles) west of the community.[1] The restriction is necessary to avoid short spacings to Station WCWV(FM), Channel 225B, Summersville, West Virginia and Channel 227A (a vacant allotment) at White Sulphur Springs, West Virginia.

3. In view of the fact that Montgomery, West Virginia, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Montgomery, West Virginia	---	227A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 27, 1988,** and reply comments on or before **July 12, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jeffrey R. Batten
Manager, Upper Kanawha Valley
Broadcasters, Inc.
1028 First Avenue
Montgomery, West Virginia 25136
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the proposed site are 38-09-47 and 81-23-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-189

In the Matter of

Amendment of Section 73.202(b), RM-6284
Table of Allotments,
FM Broadcast Stations.
(Highlands, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1988; Released: May 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Mountain-High Broadcasters, Inc. (petitioner) requesting the allocation of Channel 283A to Highlands, North Carolina, as the community's first local FM service. Petitioner states that it will apply for the channel, if allocated. Channel 283A can be allocated to Highlands in compliance with the Commission's minimum distance separation requirements with a site restriction of 1 kilometer (0.6 miles) northeast to avoid a short-spacing to Channel 281A at Clayton, Georgia, for which there are applications pending.[1]

2. We believe the public interest would be served by proposing the allocation of Channel 283A to Highlands, North Carolina, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Highlands, North Carolina	---	283A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **June 27, 1988,** and reply comments on or before **July 12, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William C. Marett
Vice-President, Mountain-High Broadcasters, Inc.
P.O. Box 1420
Highlands, North Carolina 28741
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a requeste or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 35-03-39; West Longitude 83-11-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-188

In the Matter of

Amendment of Section 73.202(b), RM-6287

Table of Allotments,
FM Broadcast Stations.
(Lawton, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1988; **Released: May 5, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Broadco of Texas, Inc. (petitioner) requesting the substitution of Channel 258C2 for Channel 237A at Lawton, Oklahoma, and the modification of its license for Station KMGZ to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allocated. Channel 258C2 can be allocated to Lawton in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.2 kilometers (8.2 miles) east to avoid a short-spacing to Station KBOG, Channel 257A, Cordell, Oklahoma.[1]

2. In accordance with our established policy, we shall propose to modify the license of Station KMGZ to specify operation on Channel 258C2. However, pursuant to Section 1.420(g) of the Commission's Rules, modification of the license may not be implemented if another party expresses an interest in the proposed allotment, unless an additional equivalent channel is available for Lawton. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984).

3. We believe the public interest would be served by proposing the substitution of Channel 258C2 for Channel 237A at Lawton since it could provide the community with its fourth wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lawton, Oklahoma	232A, 237A, 251C1, 268C1 297C2	232A, 251C1, 258C2, 268C1, 297C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 27, 1988,** and reply comments on or before **July 12, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark Van Bergh, Esq.
Kenkel, Barnard & Edmundson
1220-19th Street, N.W., Suite 202
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-34-43 and West Longitude 98-16-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERITECH — Transmittal No. 145
Tariff F.C.C. No. 2

ORDER

Adopted: March 8, 1988; Released: March 9, 1988

By the Deputy Chief, Common Carrier Bureau:

1. The Ameritech Operating Companies (Ameritech) filed Transmittal No. 145 on December 11, 1987, to implement rates for optional features that provide C-Conditioning to voice grade special access service. MCI Telecommunications Corporation (MCI) filed a petition against the transmittal, to which Ameritech replied.[1] The proposed rates are scheduled to become effective March 10, 1988.

2. C-Conditioning is used to reduce distortion on voice grade private lines. By Transmittal No. 145, Ameritech proposes tariffed rates for two C-Conditioning options, Improved Attenuation Distortion (IAD) and Improved Envelope Delay Distortion (IEDD). According to Ameritech, these features are to be offered in addition to its current "basic" level of C-Conditioning service.

3. MCI disputes Ameritech's contention that IAD/IEDD service options constitute new service level offerings. MCI alleges that in several states the quality of Ameritech's current C-Conditioning includes the provision of IAD/IEDD service levels. MCI contends that the C-Conditioning options offered in Transmittal 145 are merely an unbundling of the presently tariffed C-Conditioning service. MCI Petition at 2. Consequently, MCI objects to this transmittal because the charge for the basic unbundled service (without IAD or IEDD) is the same as the old charge for the bundled C-Conditioning. MCI argues that these new unbundled C-Conditioning charges are unreasonable because the sum of the unbundled charges should not be greater than the former combined rate. *Id.* at 3.

4. Ameritech replies that, contrary to MCI's contention, basic C-Conditioning is not being unbundled. Ameritech Opposition at 3. It maintains that IAD and IEDD are two new features not currently offered by Ameritech as part of basic C-Conditioning, which result from a change in the Interexchange Carrier Compatibility Forum technical reference, TR-NPL-000334. *Id.* at 2-3. According to Ameritech, both IAD and IEDD require equipment and procedures not used with basic C-Conditioning. For these reasons, Ameritech believes that separate and higher charges are justified. *Id.*

5. The Common Carrier Bureau has reviewed Ameritech's proposed additions to its tariff, MCI's petition, and Ameritech's reply. We find that no compelling argument has been presented that the proposed tariff is so patently unlawful as to require rejection and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject filed by MCI Telecommunications Corpoaration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTE

[1] MCI Petition To Reject or, in the Alternative, Suspend and Investigate, filed Dec. 28, 1987 (MCI Petition); Ameritech Opposition, filed Jan. 12, 1988 (Ameritech Opposition). Ameritech also filed on January 12, 1988, a motion to accept its late-filed opposition. Since its opposition was only one day late, MCI was not prejudiced by the late filing and the Bureau's review of Transmittal 145 was not delayed. Accordingly, we grant Ameritech's motion. Also, MCI filed a letter with the Commission on January 27, 1988 which makes additional allegations regarding Ameritech's transmittal; Ameritech responded to that letter on March 3, 1988. As neither of these filings is contemplated by the Commission's Rules, they are not considered in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-132

In the Matter of

Amendment of Part 80 of the
Rules concerning applications for
VHF Public Coast Stations

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 24, 1987; Released: December 11, 1987

By the Commission:

1. By *Notice of Proposed Rule Making*, 2 FCC Rcd 3213 (1987), the Commission proposed a standard to distinguish applications for new VHF (156-162 MHz) public coast station applications from applications for additional working frequencies for existing VHF public coast stations.

2. Public coast radiotelephone stations are land stations in the maritime mobile service that are open to public correspondence. In general these stations are interconnected with the public wireline telephone system. By utilizing the services of these stations, ships may make and receive telephone calls to and from any telephone which has access to the nationwide public switched telephone network (PSTN) including calls overseas and to other ships. Public coast stations may service high seas, regional or local markets depending upon the frequency bands from which their channel assignments are drawn. The important difference between the services of these stations is the distance over which each can communicate.

3. VHF public coast stations provide service which is local in nature. These stations operate in the VHF-FM band of 156-162 MHz and are capable of communicating over distances of 20-50 miles. Generally, propagation in the VHF band follows a nearly line-of-sight path between the antennas of stations desiring to communicate with each other.

4. There are nine VHF public correspondence channels which are available for assignment to public coast station applicants. Initially, only one public correspondence channel is assigned to a station. If channel occupancy reaches a sufficient level, the assignment of an additional channel is allowed.

5. The short range characteristic of stations operating on the VHF channels allows the same channel to be used at many different localities. Moreover, there are only nine different VHF public correspondence channels so a maximum of nine different stations could be located in close proximity. In practice, however, usually only two or three channels serve a particular locality.

6. Under the current Rules, new applicants need only make a general public interest showing to obtain a license for an unused channel. Some applicants may attempt to avoid this requirement by characterizing an application for an additional channel as an application for new service. Existing licensees must make a showing of 40 percent occupancy during the busiest hours of service to obtain an additional channel. Thus, the FCC must determine case-by-case whether an application by an existing licensee is for a new public coast station or for an additional channel for an existing station. In processing VHF public coast station applications, the Private Radio Bureau (PRB) has considered an application from an existing licensee to be for an additional channel, rather than for new service, if the coverage area of the additional working frequency requested overlaps the coverage area of the existing stations by 70 percent or more. Because this 70 percent overlap test was not promulgated by Rule or other formal means, however, its applicability could be and has been challenged. *See Application of COMNAV Marine, Inc.*, 2 FCC Rcd 2144 (1987). For this reason, we proposed in the instant proceeding to amend the Commission's Rules to formally adopt the 70 percent overlap test.

7. Mobile Marine Radio, Inc. (MMR) filed the only comments in this proceeding. MMR supported the proposed rule amendment and agreed that the 70 percent coverage overlap test would achieve the purpose of the Rule. Because MMR is one of two applicants for a VHF public coast station at Foley, Alabama[1] it also requested that the rule amendment, if adopted, not be made retroactive.

8. We conclude that the proposed 70 percent coverage overlap Rule should be adopted. It imposes little burden on applicants or the Commission, and provides a clear test of "new" service. Therefore, we are amending the Rules substantially as proposed. Minor editorial changes have been made to delete language repeated in other Rules and to clarify our intent to distinguish *bona fide* new station applications from applications for an additional frequency. The Rule adopted in this proceeding will not be applied retroactively to MMR's application. The merits of MMR's application will be considered in a separate proceeding in PR Docket No. 87-345. We wish to make clear, however, that the administrative law judge in that proceeding is not precluded from using the Bureau's prior standard.

9. We have analyzed the Rule adopted herein with respect to the Paperwork Reduction Act of 1980 and have found that it contains no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and that it will not increase burden hours imposed on the public.

10. We hereby certify that pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 5 U.S.C. § 605(b)) that this Rule will not have a significant economic impact on a substantial number of small entities. The Rule has been applied by administrative practice and has been shown to require no increase in the information required from a public coast station applicant for new or additional facilities.

11. For the reasons stated above, IT IS ORDERED under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that the Commission's Rules ARE AMENDED as set forth below, effective.

12. A copy of this *Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

13. Regarding questions on matters covered in this document contact Robert DeYoung, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

NEW RULES

Part 80 Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 80 - STATIONS IN THE MARITIME SERVICES

1. AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In §80.371, paragraph (c) is revised to read as follows:

§80.371 Public correspondence frequencies.

* * * * *

(c) *Working frequencies in the 156 - 162 MHz band* : Initial grants will be limited to one working frequency. An additional frequency may be assigned when the assigned working frequency is also used by a foreign station near enough to result in harmful radio interference by a simultaneous operation or when the channel occupancy of the assigned frequency or frequencies exceeds 40 percent during its busiest hours of operation. An application for assignment of an additional working frequency based on channel occupancy must be accompanied by a factual showing that for any 4 days within a 10-consecutive-day period of station operation in each of 2 months immediately prior to the filing of the application, the assigned frequency or frequencies was in average daily use for exchanging communications at least 40 percent of the 3 busiest hours of each day, of which not more than half of the use time was waiting or setup time. For purposes of this paragraph, an application for a frequency which overlaps by 70 percent or more the coverage area of a frequency already authorized for use by a station licensed to the same applicant or substantially the same applicant will be considered an application for an additional frequency.

FOOTNOTE

[1] *See Hearing Designation* Order, PR Docket No. 87-345, 2 FCC Rcd 5456 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 8, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC' S PLAN TO OFFER COMPARABLY EFFICIENT INTERCONNECTION FOR A GATEWAY SERVICE AND MOTION TO BEGIN INTERIM MARKETING

On March 30, 1988, the Bell Atlantic telephone companies (Bell Atlantic) filed a Comparably Efficient Interconnection (CEI) plan to provide Gateway Service. According to Bell Atlantic, Gateway Service will allow customers to obtain access to information providers through enhanced features such as customer interaction with stored information, electronic mail, storage of enhanced service providers' data bases, and asynchronous/X.25 protocol conversion. In conjunction with the Gateway Service, Bell Atlantic proposes to market and offer two storage services. The first service is an electronic mail service involving the storage and transmission of customer-oriented printed messages and documents that Bell Atlantic will offer through the Gateway Service. The second service will permit Bell Atlantic to provide enhanced service providers with computer capacity to store information; customers may obtain access to this information through the Gateway Service.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, FCC 88-9 (released Feb. 18, 1988)), the Commission must approve Bell Atlantic's CEI plan before Bell Atlantic can begin implementing it. In a motion accompanying its plan filed on March 30, 1988, Bell Atlantic requests permission to perform unseparated marketing of its proposed Gateway Service on an interim basis pending Commission approval of its CEI Plan.

Bell Atlantic states that it will account for the joint and common costs of the Gateway Service pursuant to its Part 32 cost allocation manual that the Commission conditionally approved (3 FCC Rcd 109 (1988)) pursuant to the *Joint* Cost Order (2 FCC Rcd 1298 (1987)). Bell Atlantic also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on Bell Atlantic's plan and motion by **May 6, 1988,** and reply comments by **May 27, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of Bell Atlantic's CEI plan can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Report No. I-6205

Released: April 22, 1988

COMSAT OPEN MEETING ON INMARSAT COUNCIL 30

Comsat will hold its quarterly Open Meeting on Friday, April 29, 1988 to review the actions taken at INMARSAT Council 29 and to preview the agenda for Council 30. The Meeting is scheduled for 10:00 a.m. in the COMSAT Theater, 950 L'Enfant Plaza, S.W., Washington, D.C.

Those planning to attend the Meeting should contact Ms. Joann Lee at COMSAT (301-863-6578) prior to the meeting date. The Agenda for the Open Meeting and a report of the major actions taken at Council 20 are available for inspection in the Federal Communications Commission Common Carrier Bureau International Public Reference Room, 533, 1919 M St., N.W., Washington, D.C. 20554.

For assistance or information, contact Joel Pearlman at the FCC, (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-465

In the Matter of

Resolution of Interference
Between UHF Channels 14 and 69
and Adjacent-Channel
Land Mobile Operation

ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO FILE REPLY COMMENTS

Adopted: March 31, 1988; Released: April 4, 1988

By the Chief, Mass Media Bureau:

1. Now before the Commission is a *Motion for Extension of Time* filed March 28, 1988 by the Association of Maximum Service Telecasters (MST) requesting an extension of time, until April 25, 1988, for filing reply comments in connection with the Commission's recently released *Notice of Proposed Rule Making/Notice of Inquiry* in MM Docket No. 87-465, FCC 87-336 (released November 30, 1987) (*Notice*). That *Notice* solicited comments on proposals to amend Part 73 of the Commission's Rules to address the problem of interference between television stations operating on channels 14 or 69 and land mobile stations operating on frequencies adjacent to either channel. The *Notice* specified January 19, 1988 as the deadline for comments and February 3, 1988 as the deadline for reply comments.

2. On December 16, 1987, MST requested a sixty-day extension of time for filing of comments and replies, but specifically asked the Commission to set deadlines of February 17, 1988 for comments, and March 2, 1988 for reply comments, which provided for only a thirty-day extension of the original deadlines. By an *Order* dated January 4, 1988, the Mass Media Bureau granted MST's motion and set filing deadlines using the specified dates.[1]

3. On the same day the Bureau issued the extension *Order*, MST filed an errata to its motion for extension of time, pointing out the discrepancy. MST stated that it intended to request deadlines of March 21, 1988 for comments, and April 4, 1988 for reply comments. The Mass Media Bureau granted MST's amendment and substituted these dates as the deadlines for comments and reply comments.

4. In its *Motion for Extension of Time*, MST maintains that it needs additional time because (1) the large number of comments filed in this proceeding, particularly the comments of Land Mobile Communications Council (LMCC), among others, raise technical questions regarding the appropriateness of the suggested protection criteria; and (2) MST is prevented from obtaining timely advice and consultation from its members and engineers due to their preparations for upcoming annual meetings. MST maintains that the extension will not delay action on assignment of new stations on channels 14 and 69 as applications for additional UHF stations are frozen pending action in the advanced television inquiry. MST also states that the LMCC has no objection to the requested extension of time.

5. For all of the reasons cited by MST in its Motion for Extension of Time, we believe it would be beneficial to provide the additional time sought. However, in the absence of extraordinary circumstances, we do not contemplate any further extensions.

6. Accordingly, IT IS ORDERED that the date for filing reply comments in MM Docket No. 87-465 is extended until **April 25, 1988.** This action is taken pursuant to authority provided in Section 4(i) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

7. For further information concerning this proceeding, contact Douglas J. Minster, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTE

[1] Order Granting Request for Extension of Time to File Comments in MM Docket No. 87-465.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-184

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Coalinga, California) — RM-6116

NOTICE OF PROPOSED RULE MAKING

Adopted: April 7, 1988; Released: May 6, 1988

By the Deputy Chief, Policy and Rules Division:

1. William L. Zawila (petitioner), permittee of Station KNGS(FM) (Channel 261A), Coalinga, California, has filed a petition for rule making seeking the substitution of Channel 261B1 for Channel 261A and modification of its permit to specify operation on the higher-powered channel. Petitioner advises that adoption of its proposal would provide the first expanded coverage FM service to Coalinga.

2. We believe there are public interest benefits inherent in petitioner's proposal. A staff engineering analysis shows that Channel 261B1 can be substituted for Channel 261A at the transmitter site specified in petitioner's construction permit,[1] consistent with the minimum distance spacing requirements specified in Section 73.207(b) of the Commission's Rules.

3. In consideration of the above, we shall propose to substitute Channel 261B1 for Channel 261A at Coalinga, California, as requested. Additionally, we shall propose to modify the Class A permit of Station KNGS(FM), in the event Channel 261B1 is substituted for Channel 261A at Coalinga. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, modification of the permit of Station KNGS(FM) may be implemented without demonstrating the availability of an additional equivalent channel for use by other interested parties.

4. Accordingly, in order to provide Coalinga with its first expanded coverage FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Coalinga, California	261A	261B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 27, 1988,** and reply comments on or before **July 12, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, and his consultant, as follows:

William L. Zawila
12550 Brookhurst Street
Garden Grove, CA 92640

Michael T. McKenna
McKenna Communications, Inc.
P.O. Box 90277
Long Beach, CA 90809
(Consultant)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates at petitioner's proposed site are 36-08-40 and 120-20-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-535

In the Matter of

Amendment of Section 73.202(b), RM-5806
Table of Allotments,
FM Broadcast Stations.
(Atlantic, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1988; Released: May 6, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Nishna Valley Broadcasting Co., Inc. (formerly Valley Broadcasting, Inc.) (petitioner), the Commission has before it the *Noticeof Proposed Rule Making*, 2 FCC Rcd 7312 (1987), proposing the substitution of Channel 279C for Channel 279C1 at Atlantic, Iowa, and the modification of its license for Station KJAN-FM to specify the higher powered channel. Petitioner filed comments reaffirming its interest in Channel 279C. No other comments were received.

2. We believe the public interest would be served by substituting Channel 279C for Channel 279C1 at Atlantic, Iowa, since it could provide the community and its environs with expanded radio service. Channel 279C can be allocated to Atlantic in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station KJAN- FM's outstanding construction permit.[1] As proposed, we shall also modify Station KJAN-FM's license to specify Channel 279C.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Atlantic, Iowa	279C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Nishna Valley Broadcating Company, Inc. for Station KJAN-FM, Atlantic, Iowa, IS MODIFIED effective **June 20 1988,** to specify operation on Channel 279C, in lieu of Channel 279C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are North Latitude 41-23-53 and West Longitude 95-28-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-519

In the Matter of

Amendment of Section 73.202(b), RM-6072
Table of Allotments,
FM Broadcast Stations.
(Boulder City, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1988; Released: May 6, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Rock 'N Roll, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 7146 (1987), proposing the substitution of Channel 288C2 for Channel 288A at Boulder City, Nevada, and the modification of its license for Station KRRI to specify the higher powered channel. Petitioner filed comments reiterating its interest in use of Channel 288C2.[1] No other comments were received.

2. Channel 288C2 can be allocated to Boulder City in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] As requested, we shall also modify the license of Station KRRI to specify operation on Channel 288C2.

3. We believe the public interest would be served by substituting Channel 288C2 for Channel 288A at Boulder City, Nevada, since it could provide the community and surrounding area with expanded radio service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Boulder City, Nevada	288C2

3. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Rock 'N Roll, Inc. for Station KRRI, Boulder City, Nevada, IS MODIFIED effective **June 20, 1988,** to specify operation on Channel 288C2, in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were not timely filed but will be accepted for purposes of expressing continuing interest.

[2] The coordinates for this allotment are North Latitude 35-58-42 and West Longitude 114-50-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-361

In the Matter of

Amendment of Section 73.202(b), RM-5852
Table of Allotments,
FM Broadcast Stations.
(Dennysville, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1988; Released: May 6, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5711 (1987), proposing the allocation of FM Channel 275A to Dennysville, Maine, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Timothy D. Martz (petitioner). In comments, petitioner reaffirmed his intention to apply for Channel 275A at Dennysville. No other comments were received.

2. Channel 275A can be allocated to Dennysville, Maine, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1] Since Dennysville is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. In view of the fact that Channel 275A can be allocated to Dennysville to provide the community with its first FM broadcast service, we find the allotment to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Dennysville, Maine	275A

4. The window period for filing applications will open on **June 21, 1988,** and close on **July 21, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 275A at Dennysville are 44-54-13 and 67-13-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-500

In the Matter of

Amendment of Section 73.202(b), RM-6050

Table of Allotments,
FM Broadcast Stations.
(Copenhagen, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1988; Released: May 6, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Kevin O'Kane (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6859 (1987), proposing the allocation of Channel 294A to Copenhagen, New York, as the community's first local FM service. Petitioner filed comments reiterating his interest in use of the channel.[1] No other comments were received.

2. Channel 294A can be allocated to Copenhagen in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.5 kilometers (4 miles) south to avoid a short-spacing to unused and unapplied for Channel 293A at Brockville, Ontario, Canada.[2] Canadian concurrence in the allotment has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allocating Channel 294A to Copenhagen, New York, since an interest in its use has been expressed. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Copenhagen, New York	294A

4. The window period for filing applications will open on **June 21, 1988,** and close on **July 21, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were not timely filed. However, they have been accepted for the purpose of expressing continuing interest.

[2] The coordinates for this allotment are North Latitude 43-50-06 and West Longitude 75-40-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LEHIGH VALLEY TELCOM, INC.

File No. I-T-C-88-087

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1988; Released: May 6, 1988

By the Acting Chief, International Facilities Division:

1. We have before us for consideration an application, filed on March 10, 1988, by Lehigh Valley Telcom, Inc. (LVTI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on March 16, 1988. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. LVTI is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by LVTI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-087 IS GRANTED and LVTI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, and Satellite Business System's Tariff FCC No. 4, between the contiguous United States and those points listed in those tariffs.

5. Copies of any operating agreements entered into between LVTI and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that LVTI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL 800 TELECOM CORPORATION — File No. I-T-C-88-086

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1988; Released: May 6, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering an application, filed on March 1, 1988 by International 800 Telecom, Inc. (International 800), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone and telex services of existing carriers to provide international switched voice and telex services between the U.S. and various overseas points. The application was placed on public notice on March 16, 1988. No comments were received.

2. International 800, a Delaware corporation, is a start-up company which proposes to resell international switched voice and telex services in competition with other carriers already providing resale or such service. International 800 has filed the information required by the Commission pursuant to Section 63.01 of its Rules. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice and telex services to the general public by International 800.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-086 IS GRANTED, and International 800 is authorized to:

a. provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1, and US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S. mainland and those points listed in those tariffs; and

b. provide international telex services by the resale of the international telex services set forth in WU World Communications Inc.'s (formerly ITT World Communications Inc.) Tariff FCC No. 12 between the U.S. mainland and those points listed in that tariff.

5. Copies of any operating agreements entered into between International 800 and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FUTHER ORDERED that International 800 shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-88-085

Application for authority to acquire and operate facilities for service to the Dominican Republic and beyond

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1988; Released: May 6, 1988

By the Acting Chief, International Facilities Division:

1. The captioned uncontested application, filed on March 8, 1988, by MCI Telecommunications Corporation (MCI), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service to the Dominican Republic. The application was placed on public notice on March 16, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the Dominican Republic by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-085 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate thirty-six (36) voice-grade satellite circuits between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the Dominican Republic furnished by MCI's correspondent in the Dominican Republic;

b. lease from AT&T and operate 36 voice-grade circuits in the east coast earth station;

c. lease and operate 36 voice-grade circuits between the east coast earth station and MCI's West Orange, New Jersey operating office; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and the Dominican Republic and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreement between MCI and its correspondent in the Dominican Republic, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AETNA LIFE INSURANCE COMPANY and
AETNA CASUALTY AND SURETY COMPANY,
Plaintiffs,

v. File No. E-87-7

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

US SPRINT COMMUNICATIONS
COMPANY,
Plaintiff,

v. File No. E-87-33

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ANR PIPELINE COMPANY,
Plaintiff,

v. File No. E-87-44

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v. File No. E-87-45

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

HARTFORD FIRE INSURANCE COMPANY,
Plaintiff,

v. File No. E-87-46

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

UNITED AIRLINES, INC.,
Plaintiff,

v. File No. E-87-55

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

AUTOMATIC DATA PROCESSING, INC.,
Plaintiff,

v. File No. E-87-56

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

MUTUAL OF OMAHA INSURANCE CO.,
Plaintiff,

v. File No. E-87-57

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

CHEMICAL BANK,
Plaintiff,

v. File No. E-88-38

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

CHASE MANHATTAN BANK,
Plaintiff,

v. File No. IC-87-02652

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

FIRST INTERSTATE SERVICES
COMPANY,
Plaintiff,

v. File No. IC-87-02653

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

TEXACO, INC.,
Plaintiff,

v. File No. IC-87-04524

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ERRATUM

Released May 6, 1988

By the Chief, Common Carrier Bureau:

On April 13, 1988, the Common Carrier Bureau (Bureau) released a *Memorandum Opinion and Order*, (DA 88-462) in the above-captioned proceedings which erroneously included references to subsection (c) of Section 415 of the Communications Act, 47 U.S.C. § 415, rather than the correct subsection (b). This erratum corrects paragraphs 1, 10 and notes 26 and 30 of the Order by deleting references to Section 415(c) and inserting in their place references to Section 415(b). In addition, note 4 of the Order is corrected to read as follows:

4 Section 415(b) states:

> All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MARYLAND PORT ADMINISTRATION — File No. I-T-D-88-002

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from high seas radiotelegraphy public coast station WMH near Baltimore, Maryland

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: April 29, 1988; Released: May 6, 1988

By the Chief, Common Carrier Bureau:

1. On October 28, 1987, the Maryland Port Administration (MPA) filed an application with us requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from its high seas radiotelegraphy public coast station WMH, located at the Dundalk Marine Terminal near Baltimore, Maryland. The station currently provides medium-frequency (MF) and high-frequency (HF) public correspondence service twelve hours per day, seven days per week to vessels operating in the North Atlantic, Caribbean and Gulf of Mexico. The station which primarily serves the Baltimore, Maryland area, covers a range of approximately 1500 to 2000 miles.

2. MPA proposes to discontinue operation of the station due to reduced levels of traffic at the facility and the availability of nearby, equally powerful and less costly service provided by Marine Radio Stations WSC in West Creek, New Jersey and WCC in Chatham, Massachusetts. The applicant states that no distress or emergency calls have been recorded for over one year, and that the small volume of traffic it received does not meet present operating expenses. According to MPA, pursuant to FCC approval, it reduced the hours of the station from twenty-four to twelve hours per day in January 1986, but still traffic has decreased nearly 50% from 17,438 minutes in fiscal year 1985 to 8,961 in fiscal year 1987. Operating losses in fiscal year 1987 amounted to almost 68,000. MPA also states that its principal user is not concerned by the closure of the station. MPA expects revenues to continue to decline and costs to continue to rise, resulting in greater and greater losses, and believes it unreasonable to expect the public to pay the increased rates which would be necessary to continue operation of this station. MPA specifies six stations which provide the same or comparable services -- WCC-Chatham, Massachusetts, WSC-West Creek, New Jersey, WPA-Port Arthur, Texas, WPD-Tampa, Florida, WLO-Mobile, Alabama, and KLC-Galveston, Texas. MPA also lists five Coast Guard stations which handle distress calls.

3. Comments concerning closing of station WMH were filed with the Commission. They are listed in the Appendix attached hereto. Formal comments requesting denial of the application or, at the very least, extension of the time to comment were filed by the Radio Officers Union of the National Marine Engineers' Beneficial Association and the American Radio Association, Communications and Electronics Membership Group of the International Organization of Masters, Mates and Pilots (Union Comments) on December 1, 1987. The Union Comments describe several points which they allege require denial of the application. They suggest that there have been too many closures of public coast stations in recent years, based on financial problems. The Union Comments argue that loss of revenue should not be the only criterion for closing such stations and that station, WMH, could easily be made economically viable by the investment of additional funds for installation of more modern equipment such as SITOR. The Union Comments contend that MPA has made no effort to enhance its profitability, and now hides behind its loss of revenues. The Union Comments state that the alternative stations noted by MPA do not cover all the territory served by WMH, especially between New Jersey and Florida. The Union Comments also contend that stations such as WMH are filing a "pro forma" list of alternative stations that do not provide the "personalized service" provided by the station proposed to be closed. The Union Comments proceed to argue it is contrary to national defense policy to completely rely on satellite communications and that closure of of this station will be anticompetitive. Furthermore, they state that it is the Commission's duty to "maintain a public coast station system adequate for international trade and shipping" and that MPA cannot contend that alternative distress and safety systems would be adequate. The Union Comments also allege that it would be an abrogation of international treaty requirements, and our duty to ensure proper service to the U.S. public, if we allowed station WMH to be closed. Finally, the Union Comments state that the time for filing of comments on the application should be extended to provide an opportunity for filing of any further comments.

4. On December 7, 1987, MPA filed its response to the Union Comments.[1] The response makes the following points: (1) the needs of the customer will be met by remaining stations on the east and gulf coasts which offer good service and lower rates; (2) station WMH cannot reduce its losses by advertising or by operating 24 hours a day; and (3) making additional expenditures for upgrading the station would not increase business, but would merely be "throwing good money after bad." Finally, MPA states extension of the deadline for filing any comments is unnecessary, since adequate notice was given, and delay would prejudice the future employment opportunities of station employees.

DISCUSSION

5. Section 214(a) of the Act establishes the basic statutory test that we should apply in considering applications for discontinuance of common carrier service to a community. We may permit discontinuance of a service upon a finding that "neither the present nor the future public

convenience and necessity will be adversely affected" by the proposed action. In order to make such a finding we must balance the financial burden which would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[2]

6. In the instant application, MPA demonstrates that continued operation of WMH will result in financial losses. MPA provided data required by the Commission's Rules showing that for the fiscal years of 1985-1987 MPA sustained losses of74,376,108,487 and 67,765, respectively. Also messages for July, August, and September 1987, totaled 809, 566, and 595, respectively. In January 1987, WMH with the Commission's consent, decreased its hours to twelve hours per day because of steadily declining traffic and increasing losses. Traffic has continued to drop, and while expenses have declined slightly, the operating losses are still high.

7. In acting on applications for discontinuance, we must also determine whether alternative facilities will be available to the user community if discontinuance is allowed, and whether the remaining facilities available to the user community are capable of handling the redistribution of traffic that will result. In its application, MPH names six public coast stations as alternatives to WMH: (1) WCC, Chatham, Massachusetts; (2) WSC, West Creek, New Jersey; (3) WPA, Port Arthur, Texas; (4) WPD, Tampa, Florida; (5) WLO, Mobile, Alabama; and (6) KLC, Galveston, Texas. However, Station WPA, Port Arthur, Texas has been authorized by the Commission to discontinue service. We sent letters to all the remaining stations, requesting information as to their ability to handle the traffic now routed via WMH and their willingness to hire new employees, if necessary, to handle such traffic. We received responses from four of the stations, WCC, Chatham, Massachusetts, WPD, Tampa, Florida, WSC, West Creek, New Jersey and WLO, Mobile, Alabama. It is clear from these responses that any of these stations are able to accept all of the traffic of WMH. Further, all four stations are willing to make any changes necessary in order to accept all of the traffic from WMH if it is authorized to discontinue service. The responses indicate that the substitute facilities are available to meet the needs of the user community.

8. The Union Comments also contend that the closure of station WMH will harm national defense, weaken competition, contravene U.S. obligations to the International Telecommunications Convention, and contradict the Commission's responsibility to promote the safety of life and property pursuant to the Communications Act. [3] However, the Union Comments do not provide sufficient facts to buttress their contentions that the closure of this single station would be (1) detrimental to the national defense of this country, (2) weaken competition; nor (3) contravene U.S. international obligations or otherwise contradict this Commission's responsibilities under the Act.

9. As to the request in the Union Comments for extension of time to file comments concerning the instant application, we believe that the notice given by the applicant and by the Commission is sufficient to afford anyone interested in this matter an opportunity to make their views known to the Commission and that ample time has been given for comments. We perceive no need for the extension of time requested.

ORDERING CLAUSES

10. Accordingly, IT IS CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of service from station WMH.

11. IT IS THEREFORE ORDERED that application File No. I-T-D-88-002 IS GRANTED, and MPA is authorized to discontinue service from its public coast station WMH near Baltimore, Maryland.

12. The requests for extension of time to file comments are hereby DENIED.

13. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX

List of Commenters

Kerr Steamship Company, Inc.
EB Radio Traffic Service
The Professional Marine Communicator
The Bill Lukowski Steamship Agency, Inc.
United States Navigation, Inc.
Radio Officers Union, District 3 of the National Marine Engineers' Beneficial, AFL-C10 and the American Radio Association, Communications and Electronics Membership Group of International Organization of Masters, Mates and Pilots, ILA, AFL-C10
Master of M/V Turkuje
Paul J. Smith, Jr.
Kenneth Cossabom, Radio Electronics Officer
Marmaras Navigation, Ltd.
Michael Groetschel, Radio Officer
Barber Steamship Lines, Inc.
Rodolfo A. Reate, Radio Officer
Manuel Crueldad, Radio Officer
John C. Anderson, Sr.
Paul Du Mesnil, Radio Officer

FOOTNOTES

[1] *See* Commission Public Notice of Ex Parte Presentations in Informal Rule Making Proceedings, Non-Docket Presentations dated March 30, 1988.

[2] Public Coast Radiotelegraph Stations, 67 FCC 2d 790, at 795 (1978).

[3] As for the question of coverage on the 500 KHz safety and distress frequency, the Commission has previously stated in its report to the Congress on Maritime Public Coast Stations that the provision of a distress or safety watch should not be a factor in determining whether a public coast station may or may not close. The Coast Guard has the primary responsibility for providing 500 KHz safety coverage along the coasts of the U.S. *See* the Commission's *Report to Congress, A Study of Maritime Public Coast Station Operations,* Services and Industry, December 1979. The Coast Guard has developed a comprehensive network to provide safety services to the maritime community. In addition, all the stations which responded to our letters concerning coverage maintain the 500 KHz distress frequency.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NEW JERSEY BELL TELEPHONE COMPANY	File Nos. 10034-CDM-P-83, 10035-CDM-P-83, 10105-CDM-P-83, 10106-CDM-P-83, 800-CDM-P-84, 803-CDM-P-84

For Authority to Construct and Operate a Digital Termination and System Network in the Digital Electronic Message Service

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 1988; Released: May 6, 1988

By the Chief, Domestic Facilities Division:

1. The Domestic Facilities Division has before it the application of New Jersey Bell Telephone Company (hereinafter Applicant) for authorization to construct a Network of Digital Termination System (DTS) facilities for Digital Electronic Message Service (DEMS).[1] The initial phase of Applicant's network will consist of constructing two digital termination system facilities in Newark, New Jersey and Philadelphia, Pennsylvania.[2] These DTS applications are not mutually exclusive with any pending applications. Applicant is a Bell Operating Company (BOC) offering exchange access and exchange telecommunications services.

2. A Petition to Deny the above applications has been filed by Tymnet, Inc. For the reasons set forth in *C & P Telephone*, 98 F.C.C. 2d 238 (1984), we deny the petition and grant the above-mentioned applications. Moreover, Petitioner has forfeited all of its DTS construction authorizations, and dismissed all pending applications. Therefore, Petitioner is no longer a party in interest.

3. Upon review of the applications, we find that, pursuant to the requirements of Section 214 and Title III of the Communications Act of 1934, as amended, Applicant is legally, financially and technically qualified to construct the facilities for which it has applied consistent with the findings in this Order.

4. Accordingly, IT IS ORDERED that the petition of Tymnet, Inc. is hereby declared moot.

5. IT IS FURTHER ORDERED that the System Application of New Jersey Bell Telephone Company IS HEREBY GRANTED, and construction permits for the specific facilities described in Appendix A are hereby GRANTED.

6. IT IS FURTHER ORDERED that applicant is to provide just, reasonable, and non-discriminatory service as required under Title II of the Communication Act.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

APPENDIX A

File Number	SMSA	DEMS Channel
10034-CDM-P-83	Newark, NJ	06
10035-CDM-P-83	Philadelphia, PA	06

FOOTNOTES

[1] Applicant initially submitted applications for a Limited network. In the *Revision* of art 21 of the Commission's Rules, 2 FCC Rcd 5713 (1987), the distinction between Limited and Extended networks was eliminated.

[2] The remaining applications, 10105-CDM-P-83, 10106-CDM-P-83, 800-CDM-P-84 and 803-CDM-P-84, will be considered at a later date.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Local Exchange Carriers'
Individual Case Basis
DS3 Service Offerings

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: March 25, 1988; Released: March 28, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By the transmittals listed in Appendix A, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from April 28, 1988 to June 5, 1988.[2]

2. This Order initiates an investigation of the LECs' proposed ICB rates and designates for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings.

II. BACKGROUND

3. The Commission's initial decision to allow ICB rates, or rates developed based on the circumstances in each case, was conditioned on the eventual development of rate schedules and the elimination of ICB rates. [3] The Commission permitted the use of ICB rates for certain services that telephone companies had not previously offered. The Commission cautioned, however, that it expected rates and regulations for such services to be set out in the relevant tariffs as they were developed. *Investigation Order*, 97 FCC 2d at 1143.

4. On March 8, 1988, the Bureau released an Order[4] rejecting tariff revisions filed by the Bell Atlantic Telephone Companies (Bell Atlantic) proposing to establish ICB rates for DS3 offerings.[5] We found that the proposed ICB rates appeared to be unreasonably discriminatory, and that the cost material filed with the transmittals was deficient.[6] We also stated that it might be appropriate for Bell Atlantic and other LECs to develop and file generally applicable rates for DS3 service because DS3 service may be sufficiently widespread to warrant a general offering. Further, we noted that continued use of ICB rates for DS3 service must be supported by "a more compelling justification" than Bell Atlantic had provided. Finally, we said that we intended to scrutinize carefully the materials supporting any future ICB filings to determine whether the proposed rates or other tariff terms were unreasonably discriminatory.

5. We have reviewed the pending transmittals listed in Appendix A. We conclude that the issues raised by the transmittals require us to seek additional information in order to determine whether the LECs' continued use of ICB rates for DS3 service is lawful, particularly in light of the findings in the *Bell Atlantic Order*. We therefore institute an investigation into the LECs' ICB rates for DS3 services and designate the issues set forth below for investigation. We also grant the LECs special permission to advance the effective dates of their transmittals, which will become effective subject to the outcome of our investigation. We grant this special permission because any extensive delay in the effective dates of these pending ICB filings would disrupt the provision of service to customers and, in some instances, expose these customers to liability under contracts they have made with other parties.

III. DESIGNATION OF ISSUES TO BE INVESTIGATED

6. We designate the following issues for investigation:

(1) Should local exchange carriers be required to offer DS3 services under a non-discriminatory averaged schedule of rates pursuant to Sections 201-203 of the Communications Act?

(2) Is ICB pricing of DS3 services unreasonably discriminatory? Are similarly situated customers paying different prices for the same or comparable services?

(3) Do the rates for DS3 service set by the local exchange carriers on an ICB basis constitute a justifiable volume discount in relation to the rates for DS1 and voice grade services? Local exchange carriers should address differences in rate relationships when similar facilities for voice grade, DS1, and DS3 services are employed. In addition, local exchange carriers should show how any differences between minimum service periods, termination liabilities, and any accelerated cost recovery over the relevant time period (front loading of costs) affect the rate relationships.

IV. PROCEDURAL REQUIREMENTS

7. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. Accordingly, we require each referenced LEC no later than April 26, 1988, to file a direct case addressing the issues outlined above. In their direct cases, the LECs must answer each specific question listed in Section III, *supra*. Moreover, each direct case must supply all information upon which the LEC relies to support its position. Pleadings opposing the direct cases may be filed by interested parties no later than May 13, 1988, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." Any LEC may file a "Rebuttal" to oppositions and comments no later than May 24, 1988. All oppositions, comments, and rebuttals must also be organized to reflect the issues designated in this Order.

8. An original and seven copies of all pleadings shall be filed with the Acting Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal matter regard-

ing ICB rates may do so by submitting one copy of their comments to the Acting Secretary, Federal Communications Commission, Washington, D.C. 20554.

9. *Ex parte* contacts *(i.e,* written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Acting Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Acting Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq*. of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq*.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201 - 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201 - 205, and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that AN INVESTIGATION IS INSTITUTED concerning the Individual Case Basis rates for DS3 services proposed in the local exchange carriers' transmittals referenced in Appendix A to this Order, and that the issues set forth in Section III, *supra*, ARE DESIGNATED FOR INVESTIGATION.

11. IT IS FURTHER ORDERED that local exchange carriers may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the transmittals listed in Appendix A. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, and assign Special Permission No. 88-156.

12. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

13. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i) and 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

Carrier	Transmittal No.	Effective Date	Days' Notice
Ameritech	156	04-28-88	90
Contel	75	05-03-88	90
SW Bell	1623	05-05-88	90
Ameritech	158	05-08-88	90
US West	131	05-08-88	90
Ameritech	160	05-11-88	90
Ameritech	161	05-12-88	90
Pac Bell	1329	05-12-88	90
Ameritech	162	05-16-88	90
SW Bell	1625	05-17-88	90
US West	133	05-19-88	90
Ameritech	163	05-26-88	90
Cin Bell	487	05-30-88	90
GTOC	374	05-31-88	90
SW Bell	1628	05-31-88	90
Ameritech	164	06-01-88	90
Ameritech	165	06-01-88	90
Ameritech	166	06-01-88	90
Ameritech	167	06-05-88	90
US West	137	06-05-88	90

APPENDIX B

The following chart provides a sample of the ICB rates set forth in the referenced transmittals. Many of the local exchange carriers propose to provide service to multiple customers; for purposes of brevity and comparability, we have in those instances limited our chart to no more than five examples per carrier. Some rates have been rounded to the nearest dollar.

Carrier	Tr. No.	Customer	No. of DS3s	Monthly RC[7]	Monthly NRC
Ameritech	164	US Sprint	2	5,982	20,323
		US Sprint	2	1,919	29,778
			US Sprint 2	1,919	0
		AT&T	2	5,842	19,000
Contel	75	Contel	4 fibers	14,732	3,193
		Advanced Systems			
GTOC	374	US Sprint	1	5,833	34,630
Pac Bell	1329	AT&T	2	5,324	9,100
		AT&T	2	3,604	7,600
		AT&T	2	3,817	18,700
Cin Bell	487	US Sprint	1	2,455	725
SW Bell	1623	AT&T	1	32,125	2,000
		AT&T	1	12,475	2,000
	1625	US Sprint	1[8]	3,150	2,000
US West	131	US Sprint	1	4,650	3,600
		MidAmerican	1	1,355	1,419
		AT&T	1	4,218	3,600
		US Sprint	1	1,320	3,592
	137	MCI	1	9,019	6,769

FOOTNOTES

[1] The LECs and their corresponding transmittals are listed in Appendix A to this Order. The LECs' proposed ICB rates for DS3 services are summarized in Appendix B. We note that while the LECs' filings also proposed ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] The Tariff Division directed all of the referenced carriers to defer the effective dates of their proposed revisions to the full 90-day statutory period to provide additional time to analyze the issues raised by the revisions. *See, e.g.,* Letter to GTE Service Corporation from Chief, Tariff Division, Mar. 11, 1988. No petitions have been filed to reject, suspend or investigate these transmittals.

[3] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 97 FCC 2d 1082, 1143 (1984) (*Investigation Order*).

[4] Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 224 and 226, Memorandum Opinion and Order, DA 88-314, released Mar. 8, 1988 (*Bell Atlantic Order*).

[5] Local Area Telecommunications, Inc. (Locate) filed petitions to reject or suspend both of Bell Atlantic's transmittals, arguing that the proposed ICB rates were unlawfully discriminatory and that the filings did not comply with Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Bell Atlantic filed replies to Locate's petitions. Bell Atlantic also responded to the Bureau's request for further information concerning the proposed ICB rates.

[6] We noted that "the record does not suggest that there is any lawful justification for what can only be described as striking disparities between the ICB rates [Bell Atlantic] charges different customers." *Bell Atlantic Order* at para. 11.

[7] Some amounts include mileage.

[8] In Transmittal No. 1623, however, SW Bell proposes to provide US Sprint with 22 DS3s at a monthly recurring charge of17,850 (and a non-recurring charge of2,000).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-208

In re applications of

JERRY SWINK (hereafter Swink) — File No. BPH-870219MB

HUNTINGTON BROADCASTING CORPORATION (hereafter HBC) — File No. BPH-870224MD

For a Construction Permit
for a New FM Station on
Channel 270A in Huntington, Texas

HEARING DESIGNATION ORDER

Adopted: April 22, 1988; Released: April 28, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Swink.* On February 19, 1988, HBC filed a Petition to Dismiss or Deny against Swink challenging the applicant's existence. HBC's Petition is essentially a petition to specify issues. Since the Commission's *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendment of Part 2 of the Commission's Rules*, Report and Order, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered herein. However, an opportunity to raise these allegations will be afforded HBC post-designation pursuant to 47 C.F.R. § 1.229.

3. On November 2, 1987, HBC filed a Petition to Dismiss or Deny the application of Jerry Swink, alleging that Swink's proposal violates 47 C.F.R. Section 73.315(a). The Commission no longer requires a waiver request where an applicant proposes to include more than 80 percent of the community of license within the 3.16 mV/m contour. *See Letter to Southwest Communications, Inc.* from Dennis Williams, Acting Chief, FM Branch (reference 8920-HVT), July 16, 1986, *citing John R. Hughes et al.*, 50 Fed. Reg. 5679 (1985). Engineering analysis indicates that applicant Swink will cover at least 80 percent of the area and is thus considered to be in substantial compliance with 47 C.F.R. § 73.315. Therefore, no waiver request is necessary. Accordingly, HBC's petition will be denied.

4. Section V-B, Item 10 of FCC Form 301 requires each applicant to supply certain Sectional Aeronautical charts of the area proposed to be served. Specifically, this item requires a showing of the predicted 3.16 mV/m and 1 mV/m contours. Swink's application indicates that the 70 dBu contour in the direction of its community of license is 13.51 km. However, the contour map shows a distance of 14.5 km from the transmitter site to the 70 dBu contour. Due to the small scale used on applicant's contour map, the staff is unable to accurately determine the exact coverage. Accordingly, Swink will be ordered to file a new, clearer contour map showing the 70 dBu contour and the city of license within 30 days of the release of this Order with the presiding Administrative Law Judge.

5. *HBC.* Principal Robert Dale Tindle has indicated he is employed as technical director at stations KLVI(AM) in Beaumont, Texas; KYKR (FM) in Port Arthur, Texas; and KTSR (FM) in College Station, Texas. HBC states in its application that Robert Dale Tindle will divest himself of all broadcast interests upon a grant of the instant application. Accordingly, in the event of a grant of HBC's application, Robert Dale Tindle will be ordered to sever all broadcast interests prior to the commencement of program test authority.

6. *Other Matters.* The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
HBC	12/8/87

7. Section II, item 5(a), FCC Form 301 (January 1982) requires an applicant to specify its address (number, street, city, state) as well as the home address of each of its principals. Swink has not completed item 5(a) correctly. The Swink application gives a Post Office Box number as the residence address of Jerry Swink. Accordingly, Swink must submit an amendment which gives all the information required by Section II, item 5(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That HBC's November 2, 1987, Petition to Dismiss or Deny IS DENIED.

12. IT IS FURTHER ORDERED, That Swink shall file the corrective contour map specified in Paragraph 4 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That Robert Dale Tindle will divest himself of all broadcast interests prior to the commencement of program test authority.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: HBC

15. IT IS FURTHER ORDERED, That Swink shall submit an amendment which contains the information required by Section II, item 5(a), FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S PETITION FOR WAIVER OF CEI REQUIREMENTS

Released: April 13, 1988

On April 1, 1988, the Bell Atlantic telephone companies (Bell Atlantic) filed a petition requesting a waiver of the Commission's Comparably Efficient Interconnection (CEI) requirements. Bell Atlantic seeks permission to conduct a series of technical trials to evaluate several technologies that could be used to provide a messaging service for coin telephone customers. According to Bell Atlantic, the service will allow coin telephone customers, who have placed a call and receive a busy signal or no answer, to record a message that will be forwarded at a later time. Bell Atlantic states that the trials would be limited to twelve months and would involve no more than 300 coin stations in each of three LATAs.

Bell Atlantic specifies that it submits this waiver with the understanding that it is not seeking Commission approval of any further deployment of coin voice messaging beyond these three limited technical trials.

Interested parties should file comments on this petition by **May 13, 1988,** and reply comments by **June 8, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of the Bell Atlantic's petition can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation — Transmittal No. 79

Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1988; Released: April 27, 1988

By the Chief, Common Carrier Bureau:

1. On January 29, 1988, Rochester Telephone Corporation (Rochester) filed its Transmittal No. 79 proposing to modify its traffic sensitive (TS) rates for local switching and local transport, and its equal access cost recovery (EACR) charge, based on revised demand forecasts.[1] The tariff is presently scheduled to become effective on April 28, 1988, on 90 days' notice. In this Order we reject Rochester's proposed tariff revisions for the reasons discussed below.

I. BACKGROUND

2. In October 1987 Rochester filed monthly historical demand figures for the time period of July 1984 to June 1987 and a forecast of TS switched access demand for calendar year 1988. Rochester projected TS demand for 1988 to be 687 million MOUs. In our *December 24 Order*,[2] we found that Rochester's forecast of 1988 TS demand appeared to be understated. We performed a number of analyses which revealed deficiencies in the Rochester projections. [3] As a result, we used our linear trend forecast of 732 million MOU in place of Rochester's 1988 demand forecast to determine an adjustment in Rochester's rates.[4]

II. ISSUES

3. In Transmittal No. 79, Rochester makes three arguments. First, Rochester argues that our linear trend methodology results in inflated demand projections, and that its rates should be based instead on its revised demand forecast of 706.5 million TS MOU for 1988. Rochester states that application of our method to projections for 1987 would result in a forecast that was higher than actual 1987 demand and that the 1988 forecast produced by our method must therefore also be regarded as unreasonably high. Rochester Description and Justification (D&J) at 8. Rochester also asserts that our forecast was not based on the best historical data available.[5]

4. Second, Rochester states that its new projection of 1988 TS demand, 706.5 million MOU, embodies the same growth rate as 1987 demand (7.2 percent) and is therefore reasonable. *Id.* at 20. Rochester also contends that the growth rate of 1988 demand should be no greater than the growth rate for 1987 demand.[6] Rochester states that, in fact, its growth rate in 1988 may be significantly lower than its 1987 rate. *Id.* at 19-20.

5. Third, Rochester claims that if the "report card test" we used in the *December 24 Order* is applied to Rochester's corrected 1987 data, as submitted in the instant filing, Rochester would no longer fail the test applied in the Order.[7] *Id.* at 12-14.

III. DISCUSSION

6. We stated in the *December 24 Order* at para. 293 that any carrier wishing to revise its rates or the methodologies by which rates and projections were calculated should provide a full showing pursuant to Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, in support of its revision, and should respond to the concerns that prompted us to find the rates and projections unacceptable. Rochester states that it incorporates here by reference its cost figures from the October filing, but it has submitted nothing that indicates any projected cost impact from its decreased demand figures. The failure to provide this cost data has prevented any meaningful evaluation of the proposed demand figures.

7. Rochester has not provided a sufficient response to the concerns we expressed. We are not persuaded by Rochester's argument that 1988 TS MOU should reflect no more than 7.2 percent growth. First, the demand stimulation from AT&T's 1987 toll reductions may have significant effect on Rochester's 1988 demand, and 1988 demand growth might exceed that of 1987. Second, Rochester has corrected its measurement of historical 1987 demand twice since October 1987, and we are not confident that Rochester has achieved a fully accurate view of historical 1987 demand.[8] In light of these circumstances, a more complete and persuasive showing would be required to demonstrate that a forecast of 1988 demand growth of 7.2 percent is reasonably accurate.

8. With regard to the specific arguments that Rochester has made against our linear trend methodology, we continue to believe that the forecasting method we employed in the *December 24 Order* yields reasonable results.[9] We are also not convinced that use of Rochester's so-called "actual TS MOU" is superior to use of derived TS MOU.[10] When our testing indicates that a carrier's own projections are unreasonable, we believe that a linear trend forecast based on derived TS MOU provides the best available alternative means of forecasting.[11]

9. With these considerations in mind, we conclude that Rochester has provided inadequate support and justification for its proposed revisions. It has submitted only partial information in support of its proposed changes. We believe that a full Section 61.38 showing, as we ordered in the *December 24 Order*, is needed in order to permit us to analyze thoroughly Rochester's proposed changes. The present circumstances require that Rochester substantiate its arguments with persuasive showings of supplemental data that are up to date and reliable. The instant filing is so deficient in making the necessary showing and providing the necessary information that we must reject the transmittal for failure to achieve sufficient compliance with Section 61.38 requirements.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that Rochester Telephone Corporation Tariff F.C.C. No. 1, Transmittal No. 79, IS REJECTED.

11. IT IS FURTHER ORDERED that Rochester Telephone Corporation SHALL FILE tariff revisions not later than May 6, 1988, to become effective on not less than one day's notice, in order to remove rejected material from the tariff and reinstate effective material. For this purpose Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived, and Special Permission No. 88-201 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Rochester proposes to raise its TS rates from the current 2.841 cents per minute of use (MOU) to 2.956 cents per MOU, and its EACR charge from 3.7642 cents to 3.9002 cents per equal access line. No petitions to reject, suspend or investigate have been filed.

[2] Annual 1988 Access Tariff Filings, DA 87-1876, 3 FCC Rcd 1281 (1987)(*December 24 Order*).

[3] *See December 24 Order* at paras. 219-223. We performed two basic sorts of analysis. The first, "report card tests," compare a carrier's demand projection for a given prior year with the actual demand figures it experienced for that year. We allow actuals to exceed forecasts by as much as 5 percent before we make a finding of underforecasting by the carrier. The data showed that the Rochester filings were deficient under this analysis for both 1986 and 1987. The second type of analysis, a linear trend confidence interval test, determines whether a company's forecast departs anomalously from its own historical TS MOU experience. We compare each company's forecast to a linear trend of that company's TS MOU monthly actuals from July 1984 to June 1987. Forecasts are found to be anomalous only if they fall below the lower bound of the 95 percent confidence interval of the trend line. Rochester's 1988 forecast failed this test.

[4] We required Rochester to apply a Rate Adjustment Factor (RAF) to its proposed charges for Local Switching, Local Transport, and other switched access services, based on our TS projections, in order to reflect a partial disallowance of Rochester's proposed rates. Rochester filed the revised rates on December 30, 1987.

[5] Rochester argues that use of so-called TS "actuals" is preferable to use of derived TS data, and results in a 1988 forecast that is substantially less than our forecast of 732 million MOU. Rochester D&J at 17-18.

[6] Rochester states that demand growth in 1987 was greater than growth is likely to be in 1988 for several reasons. For example, Rochester states, American Telephone and Telegraph Company (AT&T) had two significant toll rate reductions in 1987, which stimulated demand, but the only reduction AT&T has scheduled for 1988 will take place too late in the year to have any impact on TS demand in 1988. Rochester also contends that in its October 1987 filing it submitted empirical evidence showing accelerated growth in the use of bypass services and facilities.

[7] Rochester argues that use of its corrected 1987 demand data demonstrates that its October 1986 forecast for 1987 was not unreasonably low. *Id.* at 13.

[8] Rochester submitted first-half 1987 data in October 1987, and revised its submission downwards in November 1987. Both times the data for TS demand minutes were derived from CCL revenues. Rochester now submits new data, correcting an accounting error for derived TS demand and showing actual TS demand minutes from its access tandem tapes rather than the minutes derived from CCL revenues. Rochester's submission here shows demand figures higher than those in its November filing but lower than its October data. Rochester states that these new data are the most accurate and should be used to adjust its 1988 demand forecast. We also note that Rochester's "actual" TS data for the last few months of 1987 may in fact be partially estimated. Rochester filed the instant transmittal on January 19, 1988. Accurate measures of demand data are usually not achieved until two or three months after the month for which the data are being measured. Rochester's view of the last few months of 1987 may therefore still be changing. Further, demand nationwide was stronger than expected in the last few months of 1987. The view of 1987 demand that Rochester presents in this transmittal may therefore be lower than its final view.

[9] Rochester's argument, that the linear trend method will not produce an accurate forecast for 1988 because application of the method for 1987 results in a forecast for 1987 that is higher than actuals, is not valid. The fact that the method produces an average necessarily implies that it overestimates demand for certain periods and underestimates demand for others; this does not detract from the validity of the method.

[10] Extensive investigation into the LECs' demand data collection methods discloses that the most closely audited (and therefore the most reliable) demand data can be derived from National Exchange Carrier Association (NECA) Carrier Common Line (CCL) revenue reports. Demand data that were not associated with NECA's CCL reports were often found to contain erroneous information. For instance, demand tapes were lost or overlooked, and corrections of billing errors were not reflected until later time periods.

[11] We agree that Rochester's corrected data would bring Rochester's 1987 projection within the 5 percent range of its 1987 actuals, allowing Rochester to demonstrate compliance with the first analytic test established in the *December 24 Order*. We note, however, that Rochester would still be deficient for the 1986 analysis and would still fail the 1988 confidence interval analysis. Since a deficiency for one year under the *December 24 Order* analysis and failure of the confidence interval test render a company's forecast subject to adjustment, Rochester's forecast would still be subject to adjustment even if we had used its revised historical 1987 data.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

William Rondini FOIA Control No. 87-205

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1988; Released: April 28, 1988

By the Commission:

1. Before the Commission is an Application for Review filed by William Rondini (Rondini) seeking review of an initial decision entered by the Chief, Private Radio Bureau on December 21, 1987, that denied Rondini's request for inspection of records under the Freedom of Information Act (FOIA), 5 U.S.C. §552. By that request, Rondin sought access to all files pertaining to amateur radio station, WA4D, Michael Whately.

2. The Bureau identified numerous letters and memoranda of telephone calls complaining about Mr. Whately. Invoking Exemption 7 of the FOIA, 5 U.S.C. §552(b)(7)(A) and (b)(7)(D), the Bureau held that the premature release of the requested material would interfere with an ongoing investigation and, as a consequence, could adversely affect any contemplated enforcement proceeding. Further, the Bureau found that disclosure would allow the requester to determine the identity of citizens who provided information to the Commission in confidence. Accordingly, it withheld access to the letters and memoranda.

3. On appeal, Rondini asks to be advised concerning the duration of the investigation and maintains that release of the requested information will not compromise the Commission's investigatory activity. Further, he requests that the complaints be made available for inspection with the names of the complainants deleted. Rondini argues that disclosure under these conditions will protect the confidentiality of the agency's sources.

4. Exemption 7(A) of the FOIA, provides that documents are exempt from disclosure if they are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. §552 (7)(A). Subsequent to the Bureau's initial response to Rondini, the investigation of Michael Whately was terminated. Therefore, Exemption 7(A) no longer applies to the requested documents.

5. Exemption 7(D) exempts from disclosure documents that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. §552 (b)(7)(D). The protections provided by this exemption are not extinguished upon the termination of an investigation. *See Brant Construction Co. v. EPA*, 778 F.2d 1258, 1265 (7th Cir. 1985). Therefore, in ruling on the application for review we still must address Rondini's claims that Exemption 7(D) does not justify withholding all portions of the complaint letters and telephone memoranda.

6. Congress and the courts have stated that a "robust" Exemption 7(D) is needed "to ensure that agencies are not unduly hampered in their investigations and that their confidential sources are not lost because of retaliation against the sources for past disclosure or because of the sources' fear of future disclosure." *Brant Constr. Co. v. EPA*, 778 F.2d at 1262. The exemption is extremely broad and protects a confidential informant's name as well as "other identifying information." *See, L & C Marine Transport, Ltd. v. Dept.* of L abor, 740 F. 2d 919, 924-25 (11th Cir. 1984). For example, if a complaint is handwritten, the identity of the complainant may be discerned by someone familiar with his or her handwriting.

7. In light of the foregoing, we will release all materials responsive to Rondini's FOIA request except for portions that could be used to discover the identity of the complainants. Handwritten complaints will be withheld in their entirety.

8. Accordingly, IT IS ORDERED, That the Application for Review filed by William Rondini IS GRANTED IN PART and DENIED IN PART. Judicial review of this decision may be sought pursuant to 5 U.S.C. §552 (a)(4)(B).

The officials responsible for this decision are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

In the Matter of

Amendment of the Commission's
Rules for Rural Cellular Service

THIRD NOTICE OF PROPOSED RULE MAKING

Adopted: February 17, 1988; Released: February 19, 1988

By the Commission:

1. On November 7, 1986, this Commission released a *Further Notice of Proposed Rule Making (Further Notice)*[1] in this docket which proposed amending the rules applicable to the filing of applications to provide cellular radio service to Rural Service Areas (RSAs). The *Further Notice* proposed prohibiting prefiling, post-filing and post-grant partial settlements among competing non-wireline RSA cellular applicants, prohibiting both wireline and non-wireline applicants from holding or acquiring any ownership interest in more than one application per RSA market, including interests of less than 1%, and prohibiting the sale, barter, transfer, assignment or other alienation of any cellular application, permit or license until the facility has been placed in operation. These changes were tentatively found to be necessary to protect the Commission's licensing processes from abuses which arose from applicants filing speculative applications in prior filing rounds.

2. Several commenters to the *Further Notice* suggested that we also amend the rules to require RSA applicants to demonstrate that they have a firm financial commitment at the time they file their applications to construct and operate their proposed system. For example, Metro Mobile CTS, Inc., states that to encourage only applicants that seriously intend to construct and operate proposed systems, "the Commission may wish to consider requiring a firm commitment of financing, conditional upon grant of a construction permit, from each applicant."[2]

3. We tentatively conclude that such a requirement would further the goals stated in the Further Notice of maintaining the integrity of our licensing processes and ensuring that only sincere applicants that intend to provide and are capable of providing high quality cellular service apply for RSA licenses. Consequently, we propose that *all* RSA applicants make a firm financial commitment demonstration that they have available at the time they file their application the funds needed to construct and operate the proposed system for one year[3] We further propose that, although an applicant can file applications in more markets than its commitment will cover, it will be awarded grants only for the number of applications its financial commitment will cover. We seek comment on these proposals[4]

4. The financial standard required of cellular applicants has changed since we started processing cellular applications. Initially, we used the prevailing standard of "reasonable assurance" that the applicant had available the funds needed to construct and operate the proposed system for one year.[5] In our Cellular Lottery Reconsideration Order, we stated that while under comparative procedures the "reasonable assurance" test was adequate, in a lottery context that standard is insufficient to deter insincere applicants. Therefore, we changed the financial standard to require a firm financial commitment from all applicants and stated that we would carefully review the tentative selectee's application to ensure compliance with the standard.

5. Various petitions for reconsideration of that Order were filed regarding, among other things, the firm financial requirement. The parties argued that the firm commitment would impose unnecessary costs on applicants with no countervailing public benefit. In our Further Reconsideration Order[6] we addressed those arguments. We noted that the costs associated with the new financial demonstrations would be high. We also stated that reviewing every applicant's financial exhibits for compliance proved difficult and time consuming and had been a major source of delay in pre- screening applications and a barrier to the expeditious conduct of the lotteries. Consequently, we decided to no longer require applicants to include an exhibit in their application demonstrating their financial ability. We did, however, require that a firm financial commitment be obtained by every tentative selectee, sole applicant in a market or surviving entity in a full market settlement within 30 days of the public notice announcing such status. Our belief at the time was that the public interest would be better served by concentrating staff resources on assuring that the potential permittees were financially qualified rather than ascertaining the financial qualifications of thousands of applicants who would not be selected in the lottery.

6. Our experience in processing the MSA applications, however, has convinced us that this procedure did not effectively prevent non-wireline applicants who were simply taking a chance in a lottery from filing. Nor did the earlier "reasonable assurance" financial test (which had to be met by all applicants) accomplish that desired result.

7. It is our intention to limit the RSA lotteries to only those applicants which are capable of carrying out their proposals. An applicant which cannot demonstrate its financial qualifications *prior to the lottery* is the type of applicant that we hope to eliminate. Our experience shows that applicants that lack the means to carry out their proposals may cause substantial delay to the process of bringing service to the public. Applicants that are merely taking a chance in a lottery attract Petitions to Deny questioning their qualifications and challenging the assertion that they are the real party in interest. These controversies delay the award of a construction permit and, ultimately, service to the public.

8. For these reasons, we are proposing the imposition of more strict financial requirement. In so doing, we hope to receive applications only from those who intend to and have the ability to carry out their proposals. By limiting the lottery pool to those who have the financial ability -- at the time they file their applications -- to perform as they propose, we are carrying out our statutory responsibilities to award licenses to *bona fide* applicants likely to provide service to the public expeditiously.

9. Therefore, we propose that *all* RSA applicants demonstrate, at the time they file their applications, that they have the available funds to construct and operate the proposed system. This financial ability must be apart from the value of the license. We seek comment on how best to effectuate this requirement. Alternatives include requiring a line of credit that is not contingent on the award of a construction permit, or requiring a line of finance that can be drawn down on at the time the application is filed. We seek comment on these and other alternatives.

10. When we addressed this issue in the Further Reconsideration, we were pre-screening all applications for financial commitment which led to substantial delays in the processing of applications. We do not expect this proposal to result in processing delays because we will verify only the tentative selectee's financial information. In addition, although we recognize that this proposal will result in some increased cost to the applicant, we believe that these costs are outweighed by the public interest benefits of accepting applications only from applicants that are capable of quickly providing quality cellular service.

11. The financial qualification rule applies to all applicants with no distinction between wireline and nonwireline. We have no evidence that wireline applicants have abused the process. We therefore request comment on whether our proposal or other measures should apply equally to wireline applicants. We also invite comment on alternative measures pertaining to financial qualification standards that may be effective in obtaining our objectives for the RSA licensing process.

12. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Regulatory Flexibility Act - Initial Analysis

13. *Reasons for action and objectives.* The proposed action promotes efficient and expedient authorization of cellular licenses in the RSAs of the country. It will also help eliminate abuses of our licensing processes and reduce possible speculation in cellular applications and licenses.

14. *Legal Basis.* The authority for this proposed Rule Making is contained in Sections 1, 4(i), 301, and 303 of the Communications Act of 1934, as amended.

15. *Small Entities affected and potential impact.* Although the proposal will increase the costs to file applications for RSAs, the action will have negligible impact on small entities that propose realistic system specifically designed to offer cellular service to rural communities. Moreover, by helping to eliminate insincere or speculative applications, the proposed rules will encourage the entry of and improve the chances of *bona fide* small businesses in the cellular licensing process. The same carriers may also benefit from more expeditious licensing of RSA areas.

16. *Reflect federal rules which overlap, duplicate or conflict with this action.* As discussed in this *Notice*, the proposed rules alter the Commission's existing rules regarding the financial qualifications standard for cellular applications for RSAs. Other than the specific rules changed, to our knowledge there is no federal rule that conflicts with, duplicates, or overlaps the proposal made in this *Notice*.

17. *Reporting, record - keeping and compliance requirements.* None.

18. *Specific alternatives that could accomplish the same objectives.* Comment is invited on related, alternative measures.

19. Comments on all aspects of the analysis and proposed rule (see Appendix A) of this Notice are encouraged. Interested persons are invited to submit comments in accordance with Section 1.419 of the Commission's Rules, 47 CFR Section 1.419. Comments must be filed by **March 4, 1988** and reply comments by **March 14, 1988.**

20. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

21. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision- making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commission or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

22. A copy of this Notice of Proposed Rule Making shall be sent to the Chief, Counsel of Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Amendment of the Commission's Rules for Rural Cellular Service, 1 FCC Rcd 499 (1986).

[2] Metro Mobile CTS, Inc. comments to the Further Notice at p. 6.

[3] We will verify, however, only the tentative selectee's financial information.

[4] The comment period for the Further Notice has closed. We do not intend by this Third Notice for commenters to address the proposals set forth in the Further Notice and previously commented on but seek comment instead on the issues discussed herein. As stated above, many commenters have already addressed these issues in their comments to the Further Notice. Those of course will be taken into account in deciding the issues raised in this Third Notice. Because of the limited nature of this Notice and in an effort to dispose of all these related matters expeditiously so that we can begin licensing rural service providers, we believe that it is reasonable to require comments to be filed on March 4, 1988 and reply comments on March 14, 1988.

[5] Cellular Lottery Reconsideration Order, 58 Rad. Reg. 2d (P&F) 677 (1985) (Reconsideration Order).

[6] Cellular Lotteries (Further Reconsideration), 59 Rad. Reg. 2d (P&F) 407 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-080

In the Matter of

Amendment of Section 73.202(b), RM-5625
Table of Allotments,
FM Broadcast Stations.
(Fort Myers Villas, Florida)

ORDER DENYING REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: April 27, 1988; Released: April 28, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Sunshine Broadcasting, Inc. (Sunshine), the Commission issued the *Notice of Proposed Rule Making*, 3 FCC Rcd 1083 (1988), proposing to substitute Channel 291A for Channel 292A at Fort Myers Villas, Florida, and to modify Sunshine's construction permit to specify the new channel. The date for filing comments and reply comments ends April 29, 1988 and May 16, 1988, respectively.

2. On April 18, 1988, Sunshine filed a request seeking an extension of time to and including June 28, 1988, in which to file comments. Sunshine states that the petition for rule making was filed with the anticipation that a final action in this proceeding would coincide with the conclusion of all appeals against the grant of the construction permit. Sunshine notes that L.B.C., Inc. (applicant for Channel 292A) has unexpectedly filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit challenging the grant of Sunshine's permit. Sunshine argues that while it is not legally barred from constructing, it is uncertain whether the best course of action is to construct prior to or at the conclusion of the court case. Additionally, Sunshine argues that uncertainty exists that the FAA will approve the requested tower site for Chanel 291A. As a final matter, Sunshine points out that its president is out of the country until April 27, 1988, two days prior to the comment deadline, and therefore Sunshine cannot reach a definite decision as to which channel it finds preferable by the comment date.

3. Section 1.46(a) of the Commission's rules states the Commission's policy that extensions of time shall not be routinely granted. We find that Sunshine has not stated sufficient grounds for departure from Commission policy. First, we do not believe the pendency of an appeal of the grant of Sunshine's construction permit, and any resulting uncertainty that appeal may engender, constitutes sufficient cause for an extension of time in this proceeding. The possibility of an appeal was a factor Sunshine could have taken into account when it filed its petition for rule making. Although Sunshine apparently is now of the view that, because it might not construct its station until such time as the appeals process is completed, and therefore, a delay in this proceeding would not measurably delay construction of its station, we do not believe that fact is relevant to the question of whether the Commission should depart from duly established procedural dates. Second, the potential FAA problems with the proposed new channel do not constitute sufficient grounds for an extension of time. Sunshine in its original petition requested substitution of Channel 291A for Channel 292A at Fort Myers Villas for the sole purpose of relocating from the east to the west side of the Caloosabatchee River due to FAA restraints and identified a site area. Sunshine now reports that FAA approval of the Channel 291A site is in doubt and that Sunshine may, therefore, withdraw its petition. Sunshine does not state why, in the approximately six months that elapsed since its original petition was filed, it has not been able to resolve any potential FAA problems. Therefore, we find that Sunshine's FAA concerns are not sufficient to warrant an extension of time. Finally, Sunshine has drawn no connection between the absence of its President from the country and its inability to reach a decision as to its intent in this proceeding prior to April 29. Therefore, Sunshine's final basis for an extension of time is also insufficient.

4. In view of the above, IT IS ORDERED, That the request for an extension of time in which to file comments in the above proceeding, IS DENIED.

5. This action is taken pursuant to the authority found in Sections 4(i), 5(d) and 303(r) of the Communications Act of 1934, as amended and Section 0.281 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HERBERT E. DICKSON — FOIA Control No. 87-213

On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1988; Released: April 28, 1988

By the Commission:

1. Before the Commission for its consideration is an Application for Review of the Field Operations Bureau's (FOB) initial decision to deny the above-referenced request under the Freedom of Information Act (FOIA), 5 U.S.C. §552. On December 10, 1987, Mr. Dickson requested copies of certain taped conversations that FOB recorded on September 23, 1987, while monitoring Taxicab Radio Service frequency 152.360. *See*, 47 C.F.R. § 90.93. The recorded conversations contain several statements by various parties concerning Mr. Dickson and his family as well as normal taxicab dispatch communications. In a letter ruling dated December 21, 1987, FOB denied Mr. Dickson's request pursuant to FOIA Exemption 3, which permits the Commission to withhold information that is specifically exempt from disclosure by another statute. Relying upon *Reston v. FCC*, 492 F. Supp. 697 (D.D.C. 1980), FOB concluded that section 705 of the Communications Act, 47 U.S.C. § 605, is an Exemption 3 statute and that it prohibits disclosure of the monitored conversations.

2. In his Application for Review, Mr. Dickson contends that the frequencies assigned to the Taxicab Radio Service are not encompassed within section 705 because they are used as part of a business service. Further, he argues that FOB's reliance upon the case of *Reston v. FCC* was inappropriate because that case dealt with amateur radio transmissions, while the subject frequency was used in the private radio services. He believes that the difference between the uses of radio in these two services is significant.

3. We conclude that the Bureau's disposition of this FOIA request was incorrect, although not for the reasons advanced by Mr. Dickson. Initially, we agree with the Bureau that section 705 is an Exemption 3 statute. FOIA Exemption 3 excludes from the FOIA's general disclosure mandate "matters that are . . . (3) specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for witholding or refers to particular types of matters to be withheld." In *Reston v. FCC*, 492 F. Supp. at 700, the District Court specifically found that section 705 satisfied the second prong of Exemption 3.

4. Furthermore, the Bureau correctly concluded that section 705 encompasses communications transmitted over frequencies used in the Taxicab Radio Service. Section 705 provides, in pertinent part, that "[n]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."[1] This prohibition encompasses all radio communications unless the sender authorizes the disclosure or one of three exclusions applies.[2] While the Commission has never had occasion to address the applicability of section 705 to transmissions in the Taxicab Radio Service, it has indicated that private radio frequencies used in the Public Safety Radio Services are encompassed within the ambit of section 705. *See Monitoring of Police and Fire Radio Transmissions by Broadcast Stations*, 1 RR 2d 291 (1963); see also *Roberts Flying Service, Inc.*, 22 RR 2d 467 (Rev. Bd. 1971); *Unauthorized Broadcast of Federal Aviation Administration Communications by Broadcast and Other Federal Communications Commission Licensees*, 23 RR 2d 1720 (1972). There appears to be no reason to distinguish between the Public Safety Radio Services and the Taxicab Radio Service for purposes of determining the applicability of section 705.

5. Nevertheless, we find that section 705 provides for disclosure of the recorded transmissions to Mr. Dickson under the unique circumstances presented. As noted above, the Act provides for disclosure when the "sender" authorizes it. The courts have construed the word "sender" to encompass both parties to a radio communication because, throughout the conversation, they are alternatively the sender and receiver. *See Rathbun v. United States*, 355 U.S. 107, 111 (1957); *United States v. Tane*, 329 F.2d 848, 852 (2d Cir. 1964); *United States v. Ballou*, 348 F.2d 467, 468 (2d Cir. 1965). In this instance, the Commission monitored only the transmissions from the taxicab company, but the content of those transmissions clearly reveals that Mr. Dickson was the intended recipient of many of the transmissions. [3] Thus, as a sender, Mr. Dickson may authorize the Commission to disclose to him the communications it has intercepted, and the matter is not within the ambit of the section 705 prohibitions or Exemption 3 of the FOIA. However, the taped communications also contain the dispatcher's communications to other taxicab drivers. Section 705 prohibits disclosure of those portions of the taped communications, and Exemption 3 thus authorizes their withholding. Therefore, the Bureau is directed to prepare for Mr. Dickson a tape of those portions of the communications to which he was clearly a party; any other taped communications should not be included on the tape provided to the requester.

6. Accordingly, IT IS ORDERED that the Application for Review filed by Mr. Herbert E. Dickson is granted in part and otherwise denied. Mr. Dickson may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B). We are providing copy of this decision to Prince Georges County Cab, Inc., and it will be accorded 10 working days from the release date of this Order in which to seek a judicial stay. The Bureau is directed not to furnish Mr. Dickson with an edited copy of the taped conversations until the 10-working-day period has expired.

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, and Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Section 2511(2)(b) of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2511(2)(b), authorizes the Commission to intercept and disclose such radio communications when necessary to performance of its law enforcement duties. *See Reston v. FCC*, 492 F. Supp. at 701; see also *United States v. Sugden*, 226 F.2d 281, 285 (9th Cir. 1955). Any disclosure in this instance would be unrelated to performance of the Commission's enforcement duties, and, hence, section 2511(2)(b) does not authorize the disclosure sought by Mr. Dickson. Reston v. FCC, 492 F. Supp at 701.

[2] Those exclusions include any radio communication "which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator." The first exclusion only applies to broadcast transmissions intended for the general public. *See* National Subscription Television v. S & H TV, 644 F.2d 820, 823-825 (9th Cir. 1981); Chartwell Communications Group v. Westbrook, 637 F.2d 459, 465 (6th Cir. 1980). Thus, it appears that none of the section 705 exclusions would permit disclosure of the subject communications.

[3] Taxicab Radio Service transmissions utilize two channels, one for the dispatcher and another for the taxicabs. The Commission was monitoring only the communications on the dispatcher's channel. Mr. Dickson was transmittingon the taxicab channel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interconnection Arrangements Between and Among the Domestic and International Record Carriers — **CC DOCKET NO. 82-122**

THE WESTERN UNION TELEGRAPH COMPANY — **CC DOCKET NO. 78-97, Phase II**

Revisions to Tariff F.C.C. Nos. 240 and 258 Filed with Transmittal No. 7346;

Revisions to Tariff F.C.C. Nos. 268 and 269 Filed with Transmittal Nos. 7347 and 7348;

Revisions to Tariff F.C.C. Nos. 229, 240, 254, 258, 260, 263, and 268 Filed with Transmittal No. 7417

MEMORANDUM OPINION AND ORDER ON FURTHER RECONSIDERATION

Adopted: April 7, 1988; Released: May 6, 1988

By the Commission:

I. INTRODUCTION

1. On May 2, 1986, we released an Order[1] directing the interconnected carrier parties (ICPs)[2] to reimburse Western Union Telegraph Company (WU) for discounts that the ICPs received pursuant to an interim prescription. We modified the reimbursement formula in our *Reconsideration Order*. [3] WU has filed a petition for further reconsideration which asks us to reinstate the original reimbursement formula. We deny that petition for further reconsideration, but clarify that the modification applies only to telex traffic carried after the effective date of Transmittal No. 7974.

II. BACKGROUND

2. The *Reimbursement Order* resulted from two intertwined Commission proceedings: CC Docket No. 78-97 and CC Docket No. 82-122. This Commission initiated Docket 78-97 in 1978 to investigate claims that WU's telex/TWX services were earning excessive returns and that those returns were used to subsidize other services.[4] The Docket 78-97 investigation originally focused on the reasonableness of WU's public rates and rate structure, but was expanded to include the rates charged to the ICPs. The investigation was later bifurcated into Phases I and II,[5] to reflect a change in WU's rate structure. The ICPs contested WU's decision to discontinue the ICP discounts from the public telex/TWX rates. The ICPs alleged, *interalia*, that it was significantly less expensive for WU to provide telex/TWX service to ICPs than to the general public. The ICPs argued that the different cost characteristics of providing service to the two classes of customers required that the ICPs be given a discount from the public rate. The administrative law judges conducting the hearings specifically scrutinized this issue.

3. In December 1981, while the Docket 78-97 investigation was still pending, the Record Carrier Competition Act of 1981 (RCCA), 47 U.S.C. § 222, was enacted. This Commission established Docket 82-122[6] to implement its directives. The RCCA permitted WU to compete in the international record market and permitted the ICPs to compete in domestic markets. The RCCA also required that terms for full interconnection of WU and ICP facilities be established and directed WU and the ICPs to reach agreement on interconnection terms within 60 days of its enactment. If those negotiations failed, the RCCA mandated that this Commission prescribe terms of interconnection within 45 days. The carriers were unable to reach an agreement, and we faced an extremely short deadline for the prescription of interconnection terms, including a prescription of rates for interconnected telex/TWX service.

4. In our April 1982 *Interim Order* [7] in Docket 82-122, we complied with the RCCA mandate and prescribed interconnection terms for the carriers. We required WU and the ICPs to provide domestic service to each other and to provide the domestic portion of inbound or outbound international service at rates discounted 15 percent from the effective public rates. This discount was established as an interim prescription only, and the carriers were ordered to keep full records of payments and telex/TWX traffic so that a "full accounting" could be made in the future if, after completion of the parallel rate investigation in Docket 78-97, we determined that the Docket 82-122 interim prescription required adjustment.

5. On October 28, 1983, this Commission released the *FinalOrder* in Docket 78-97, Phase I.[8] That *Final Order* found that WU did not realize any significant cost savings in providing telex/TWX service to the ICPs during the Phase I period, and that WU's rates and rate averaging practices were reasonable. We also stated that, because the 15 percent discount prescribed in Docket 82-122 was premised in large part on the presumption that significant cost savings existed, "we shall reassess Docket No. 82-122 accordingly." *Final Order*, 95 FCC 2d at 920. The ICPs appealed the *Phase I Final Order* to the United States Court of Appeals for the Second Circuit. That court upheld our *Final Order* in all respects.[9] On August 10, 1984, we released an Order that eliminated the discount prospectively.[10]

6. On May 20, 1985, we released the *Phase II Termination Order*, which terminated Docket 78-97, Phase II, and found that, during the Phase II period, WU did not realize any significant cost savings in providing service to the ICPs.[11] We subsequently denied an ICP petition for reconsideration of that Order.[12]

7. On July 10, 1985, WU petitioned this Commission to enter final Order terminating the Docket 82-122 proceeding and requiring the ICPs to reimburse WU for the 15 percent discount from the public rates for interconnected service provided to ICPs from June 1982 to August 1984. On May 2, 1986, we granted this petition in part in the *Reimbursement Order*. In view of the findings in the Docket 78-97 investigation that no cost savings existed, we

concluded that the interim 15 percent discount for the ICPs was not justified. We also found that the RCCA did not mandate non-cost based discounts. We therefore ordered the ICPs to reimburse WU for the amount of the discounts taken pursuant to the *Interim Order's* prescription. We rejected the ICP arguments that we lacked authority to order such reimbursements.

8. The *Reimbursement Order* concluded, however, that equitable considerations preclude ordering the ICPs to reimburse WU for the total amount of the discounts. Instead, we excepted from the reimbursement computation the domestic segment of international outbound telex/TWX traffic. We found that we had previously prescribed billing and payout practices for this traffic that essentially required the ICPs to pass through directly to their customers the discounted rates of the carrier providing the domestic segment. The ICPs therefore never actually received the discount on this traffic; rather, it was realized directly by the customers. We also found that the ICPs were liable for the other traffic because any flow-through of those discounts resulted from discretionary actions of the ICPs, rather than Commission direction. Because the ICPs knew that WU was pursuing a claim for reimbursement of such amounts, we further concluded that the ICPs would not be allowed to defeat such a claim by voluntarily passing the discount through to their customers. Finally, we found that WU was also entitled to interest on the reimbursed amounts, to be computed at the rate set by the Internal Revenue Service. We therefore ordered WU to recompute its claim for reimbursement to reflect our instructions.[13]

9. The ICPs filed petitions for reconsideration of the *Reimbursement Order*.[14] We concluded that most of the ICP arguments were not meritorious, but we decided to modify the reimbursement formula because WU had implemented a higher baseline rate in January 1983 to recover the revenues lost due to the discount.[15] The rate increase effectively reduced the impact of the discount during the period that the rate increase applied. Accordingly, we reduced the reimbursement amount by 49 percent to reflect that portion of the 15 percent discount which the ICPs had already paid in the form of higher tariffed rates.

10. On June 22, 1987, WU filed a petition for further reconsideration of the *Reconsideration Order*. WU claims that although the *Reconsideration Order* purports to deny petitions for reconsideration of the *Reimbursement Order*, the *Reconsideration Order* actually amends the *Reimbursement Order* significantly in favor of the ICPs. CCI, WUI, Graphnet, RCA, and TRT filed oppositions to the petition for further reconsideration and WU replied.

III. CONTENTIONS OF THE PARTIES

11. The WU further reconsideration petition disputes this Commission's conclusion that WU had already been reimbursed in part for amounts found to be owed by the ICPs in the *Reimbursement Order*. Petition at 3. WU claims that the rate increase of January 1983 was neither designed to produce, nor did it produce, WU's fully authorized return. WU argues that its January 1983 rate increase was not designed to recoup the ICP discount. WU admits that the documentation accompanying the rate increase cited the discount as one of two factors responsible for the deteriorating telex return. However, WU states, the rate increase was actually predicated on WU's total cost of providing service. *Id.* at 4. WU further argues that the January 1983 rate increase would not have been excessive even if WU were later reimbursed for every penny of the discount. But for the prescribed discount, WU alleges, it would have been fully entitled to charge the higher January 1983 public rate for all telex traffic -- public as well as ICP traffic. *Id.* at 6, 8. According to WU, its actual earnings results further support its position. *Id.* at 6.

12. WU further argues that the ICPs received a 15 percent discount both before and after the January 1983 rate increase, which subjected WU to a revenue loss during the entire prescription period. WU maintains that, if anything, it is entitled to a larger reimbursement for the period after January 1983, because the value of the discount during that later period was greater.[16] *Id.* at 4, 7-8. WU contends that its position is fully consistent with the fact that this Commission had prescribed only a percentage discount to be given to the ICPs, not an absolute rate to be paid by the ICPs. *Id.* at 8-9. Finally, WU asks this Commission to clarify that the reduced reimbursement ordered in the *Reconsideration Order* applies neither to Telex II (TWX) traffic nor to telex traffic prior to January 1983. WU notes that the January 1983 transmittal did not change Telex II (TWX) rates. *Id.* at n. 8.

13. The ICPs respond that the reduction in WU's reimbursement is more than justified by WU's January 1983 telex rate increase. The ICPs claim that the stated purpose of that increase was to recover revenue losses resulting from the ICP discount. TRT Opposition at 3-5, 11-12; CCI Opposition at 2-3; Graphnet Opposition at 2-4; WUI Opposition at 1; RCA Opposition at 4. TRT and Graphnet further allege that because WU was not ever ordered to reduce its public rates after the ICP discount was discontinued, WU has in fact recovered all of the reimbursement amount and the ICPs should not be subject to any further liability. TRT Opposition at 3-5, 11-12; Graphnet Opposition at 4-5.

14. The ICPs also argue that WU's failure to target or to achieve its authorized rate of return is neither proven in the record nor relevant. TRT Opposition at 6-9; CCI Opposition at 3-6; WUI Opposition at 2-3; RCA Opposition at 4. According to RCA, WU is really arguing that the original reimbursement amount should not be reduced unless WU's actual rate of return exceeded the authorized rate of return of 18.92 percent. RCA then asserts that a rate of return is a ceiling, not a floor. RCA Opposition at 2-4. WUI asserts that it was WU's duty to minimize its losses by filing a rate increase to improve its earnings, and for that reason no reimbursement should be allowed for traffic after January 1983 regardless of WU's actual realized return. WUI Opposition at 3-4. Finally, TRT and Graphnet argue that the reduced reimbursement should apply to all of the telex and TWX traffic, not only the telex traffic transmitted after the January 1983 rate increase. TRT Opposition at 10-12; Graphnet Opposition at 4-5. According to TRT, it would be particularly unfair to require the ICPs to reimburse a higher amount for traffic after January 1983. TRT Opposition at 9.

15. In its reply, WU observes that the opposing parties did not deny that they continued to receive the 15 percent discount after January 1983. WU further states that there is no dispute that its earnings were deficient. WU Reply at 2-3; Supplement to Reply at 3. WU then accuses the opposing parties of merely rearguing issues already decided and repeats its explanation of the January 1983 rate increase. *Id.* at 4. According to WU, it was under no

obligation to increase its rates to recoup the revenue loss occasioned by the interim prescription. *Id.* at 5. Its ability to increase its rates, argues WU, did not compromise its right to reimbursement. *Id.* at 7. WU justifies its failure to reduce its rates after the elimination of the discount by pointing to WU's continued earnings deficiency. *Id.* at 9. Finally, WU renews its request that the reduced reimbursement ordered in the *Reconsideration Order* apply neither to Telex II (TWX) traffic nor to telex traffic prior to January 1983. *Id.* at 8-10.

IV. DISCUSSION

16. WU's arguments are not persuasive. WU merely restates arguments that were considered and rejected in the *Reconsideration Order*. Indeed, its opposition to petitions for reconsideration argued that the January 1983 increase "(1) would have been justified even if there had been no discount and (2) left Western Union with a revenue deficiency greater than the amount of the discount." WU argued that its rate increase was due to "increased costs" and was "not designed to produce -- nor did it produce -- an adequate return on Western Union's telex/TWX services."[17] This Commission concluded in the *Reconsideration Order* that:

> the rates charged by WU to the ICPs pursuant to Transmittal No. 7974 were higher than the rates that would have been in effect had WU not sought to recover via a higher baseline rate the revenues lost due to the discount. The effect of the rate increase was to reduce the impact of the discount.[18]

We reaffirm our decision to reduce the reimbursement ordered in the *Reimbursement Order* by requiring the ICPs to pay 51 percent of that amount because WU has not presented any new arguments.

17. The sole issue raised by WU that has not already been fully and repeatedly addressed is whether this Commission intended to apply the reimbursement reduction percentage to TWX traffic and pre-January 1983 telex traffic that was not the subject of the January 1983 rate increase. We intended to reduce the reimbursement amount only to reflect the portion of the 15 percent discount that the ICPs had already paid in the form of higher rates under Transmittal No. 7974. We recognized that Transmittal No. 7974 adjusted *only* WU's telex rates and not its TWX rates,[19] and we acknowledged that an accurate calculation would have to account for the relative amount of ICP usage that had been subject to the rate increase. Because it is apparent that some parties have misunderstood our meaning, we take this opportunity to restate our decision. The amount of the reimbursement ordered in the *Reimbursement Order* must first be separated into the amount associated with telex traffic carried after the effective date of Transmittal No. 7974 and the amount associated with other traffic. Then, the amount associated with telex traffic carried after the effective date of Transmittal No. 7974 should be reduced by 49 percent. The amount associated with other traffic should not be reduced.

V. CONCLUSION AND ORDERING CLAUSE

18. For the reasons discussed above, we conclude that the arguments in WU's petition for further reconsideration are without merit, but clarify our Order as set forth herein.

19. THEREFORE, IT IS ORDERED, That pursuant to 47 U.S.C. §§154(i) and 154(j), 201-205, 222, 403 and 405, the petition for further reconsideration filed by The Western Union Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The Western Union Telegraph Co., FCC 86-190, released May 2, 1986 (*Reimbursement Order*).

[2] The acronym "ICP" includes Consortium Communications International (CCI), ITT World Communications Inc. (ITT), Graphnet, Inc. (Graphnet), RCA Global Communications,Inc. (RCA), TRT Telecommunications,Inc. (TRT), FTC Communications, Inc. (FTC), International Relay, Inc. (IRI) and Western Union International, Inc. (WUI). We note, however, that ITT and RCA have each entered into settlement agreements with Western Union dismissing all claims arising out of this proceeding.

[3] The Western Union Telegraph Co., 2 FCC Rcd 2999 (1987) (*Reconsideration Order*).

[4] The Western Union Telegraph Co., 67 FCC 2d 1420 (1978).

[5] WU employed a distance-sensitive rate schedule during the Phase I period (January 1978 to April 1981). The Phase II period began on April 24, 1981, when WU converted to a postalized, or distance-insensitive rate structure, and extended to May 1985, when the Docket 78-97 investigation was completed.

[6] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 194 (1982).

[7] Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928 (1982) (*Docket 82 - 122 Interim Order* or *Interim Order), modified on reconsideration*, 93 FCC 2d 845 (1983) (*Interim Order Reconsideration)*. The interim rate prescription was not modified in the reconsideration Order.

[8] The Western Union Telegraph Co., 95 FCC 2d 881 (1983)(*Phase I Final Order* or *Final Order)*.

[9] FTC Communications, Inc. v. FCC, 750 F.2d 226 (2d Cir. 1984)(*FTC v. FCC)*.

[10] The Western Union Telegraph Co., FCC 84-399, released Aug. 10, 1984 (*Phase II Investigation Order)*. This Order also reopened the Docket 78-97, Phase II, investigation and solicited comments from interested parties.

[11] The Western Union Telegraph Co., CC Docket No. 78-97, Phase II, FCC 85-265, released May 20, 1985 (*Phase* II Termination Order or Termination Order.)

[12] The Western Union Telegraph Co., FCC 86-189, released May 1, 1986 (Termination Order econsideration).

[13] WU submitted a report showing its computations for the reimbursement. Report of WU, filed Sept. 18, 1985. Several of the ICPs filed statements questioning the accuracy of the WU computations. See, e.g., RCA Motion for Establishment of a Procedural Schedule and Other Relief, filed Oct. 22, 1985.

[14] Petitions for reconsideration were filed by CCI, ITT, Graphnet, RCA, and TRT.

[15] Western Union Transmittal No. 7974, filed Oct. 15, 1982.

[16] Before January 1983, the public paid a telex rate of 34.75 cents per minute, while the ICPs paid 26.54 cents. After January 1983, the public paid 37.75 cents per minute, while ICPs paid 32.09 cents. Thus, the ICP discount increased from 5.21 cents per minute to 5.66 cents per minute after January 1983.

[17] Western Union Opposition to Petitions for Reconsideration, CC Docket Nos. 82-122 and 78-97, Phase II, filed July 30, 1986.

[18] Econsideration Order, 2 FCC Rcd at 3002.

[19] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

(CORRECTED)

In re Applications of	
KQED, INC.	**MM DOCKET NO. 85-396**
San Francisco, California	
For renewal of licenses of noncommercial stations	
KQED-FM	File Nos. BRED-237 BRED-800801ZS and BRED-830801WD
KQED-TV, and	File Nos. BRET-25 BRET-800801LQ and BRET-8003801LK
KQEC-TV	File Nos. BRET-203 and BRET-800801LV
KQED, INC.	**MM DOCKET NO. 84-567**
San Francisco, California	File No. BRET-830801LJ
For renewal of license of noncommercial educational station KQEC(TV), Channel 32, San Francisco, California	
MINORITY TELEVISION PROJECT	**MM DOCKET NO. 84-568** File No. BPET-831101KI
For a construction permit for a new noncommercial educational television station on Channel 32, San Francisco, California	

Appearances

James A. Treanor, III, John R. Feore, Jr., Todd D. Gray and *Corine M. Antley*, on behalf of KQED, Inc.; *B. T. Wade, Jr.*, on behalf of Minority Television Project, Inc., *David M. Rice* and *Robert T. Perry*, on behalf of California Public Broadcasting Forum; *Linda R. Figueroa*, on behalf of the Chief, Mass Media Bureau; and *David Honig, Grover Hankins* and *James Winston*, on behalf of the National Black Media Coalition, the National Association for the Advancement of Colored People and the National Association of Black Owned Broadcasters, respectively, *amici curiae*.

DECISION

Adopted: April 18, 1988; Released: May 16, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN. Board Chairman MARINO issuing separate statement.

Board Member BLUMENTHAL:

1. In this proceeding, KQED, Inc. (KQED) is seeking the grant of its 1983 renewal application for KQEC-TV, Channel 32 (KQEC), whereas Minority Television Project, Inc. (MTP) has filed a mutually exclusive application for that same facility. Also involved here are KQED's 1977 and 1980 renewal applications for KQEC-TV and for its other noncommercial educational Stations KQED-FM, 88.5 MHz, and KQED-TV, Channel 9. By way of background, the Commission originally granted without hearing the 1977 and 1980 renewal applications of KQED for all three stations over the objections of California Public Broadcasting Forum (Forum), the lead petitioner for a coalition of public interest groups. *KQED, Inc.*, 77 FCC 2d 973 (1980); *KQED, Inc.*, 88 FCC 2d 1159 (1982). Thereafter, the mutually exclusive KQED and MTP applications for Channel 32 were designated for hearing on an availability of funds issue against MTP and a noncommercial comparative issue. *Hearing Designation Order*, 49 Fed. Reg. 24073, published June 11, 1984. In the interim, however, Forum appealed the Commission's earlier actions and on January 11, 1985, the Court of Appeals reversed the Commission's renewal of KQEC's licenses for the 1977-1980 and 1980-1983 terms, and held that Forum's allegations of misrepresentation by the licensee warranted a hearing. *California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir. 1985). Accordingly, in a second hearing designation order, the Commission specified an issue to determine whether KQEC misrepresented its reasons for suspending the operations of Channel 32 from November 1979 through May 1980. The Commission also consolidated the remanded proceeding from the court involving KQEC's 1977 and 1980 renewals and its requisite qualifications to be a licensee and the 1983 comparative renewal proceeding for Channel 32. *Memorandum Opinion and Order*, 51 Fed. Reg. 3417, published January 27, 1986. Finally, presiding Administrative Law Judge James F. Tierney (ALJ) added issues against MTP to determine its "locus of control" and whether it was broadly representative of community groups; and, with respect to KQEC, he added a "meritorious programming" issue. *Memorandum Opinions and Orders*, FCC 86M-899, released March 7, 1986, and FCC 86M-1048, released March 24, 1986.[1]

2. In his *Initial Decision* (*I. D.*), FCC 86D-69, released January 16, 1987, the ALJ resolved the locus of control and community representativeness issues in MTP's favor, but disqualified MTP under the financial qualifications issue. As to KQEC, the ALJ concluded that the licensee had not misrepresented its reasons for deactivating Channel 32; nevertheless, he limited its renewals to thirty (30) months because it failed to meet the high standards of candor required of licensees. This proceeding is now before the Review Board on exceptions filed by Forum, MTP, and the Mass Media Bureau, and limited exceptions of KQEC. We have reviewed the *I. D.* in light of the exceptions and reply briefs, the oral arguments held July

10, 1987 and January 15, 1988,[2] and our examination of the record. Except as modified herein, the ALJ's findings of fact and conclusions of law are adopted. We reverse, however, the ALJ's ultimate disposition and conclude instead that KQEC has engaged in misrepresentations which disqualify it from further licenseeship of Channel 32, that MTP apppears financially and otherwise qualified to operate that facility, and that KQED is otherwise granted renewal of the licenses of its other two stations.[3]

KQEC-Misrepresentation Issue

3. The factual issue all parties agree is at the heart of this proceeding is whether KQEC misrepresented its reasons for darkening Channel 32 from November 1979 through May 1980. In its remand opinion, the Court of Appeals summarized the dispute as follows:

> [Forum] alleged that KQED had taken KQEC-TV off the air for generalized budgetary reasons in December 1979, and that when it was deactivated in that month deactivation through August 1980 was contemplated. KQED, on the other hand, contended that KQEC-TV had been deactivated because of the extraordinary costs that operating it during the installation of the new equipment would have incurred -- additional costs which KQED could ill afford given its ongoing budgetary problems.

752 F.2d at 678. The court further explicated:

> The difference is over the particular type of budgetary constraints that caused the deactivation. And it is clear that the two versions conflict: [Forum] assert[s] that budgetary discussions about the deactivation of KQEC-TV contained no mention whatever that cost savings referred to the additional costs created by the equipment installation; KQED asserts that those additional costs were, in fact, what caused the budget-saving deactivation. [Forum] contend[s] that the deactivation was originally planned to extend until the end of the 1979-1980 fiscal year -- a fact that indicates the connection with general budgetary concerns; KQED asserts that, as it told [the] FCC, it planned all along to reactivate KQEC-TV when the equipment installation was completed.

Id. at 678-79 (footnote omitted). In our view, the documentary and testimonial evidence very heavily support Forum's version of events.

A. Factual History and Analysis

4. Budgetary problems plagued KQEC-TV's operation almost from its inception.[4] Based on a showing of "unforeseen fiscal difficulties," and with Commission approval, KQEC-TV was permitted to go off the air in September 1972. In 1975, however, the Commission warned KQEC that it would no longer accept financial difficulties as justification for continued nonoperation of Channel 32, but thereafter extended the deadline for resumption of its operation to January 1977. *KQED, Inc.*, 58 FCC 2d 751 (1976); *KQED, Inc.* 57 FCC 2d 264, 268-269, n.8 (1975).[5] Anthony S. Tiano, a key figure in this proceeding, who is Chief Executive and Operating Officer for all three stations, and who became President and General Manager of KQED in August 1978, was specifically familiar with KQEC-TV's history and these 1975 and 1976 Commission orders. He also was aware of KQED's continuing financial difficulties which had persisted since KQEC-TV's return to the air in 1977, including a deficit of over one million dollars. (Tr. 807-808, 581-2; *I. D.*, paras. 26-27).

5. Tiano also believed that the television stations were technically obsolete and that new switcher equipment was required. (*I. D.*, paras. 39-40). Such equipment was ordered on April 9, 1979 with delivery expected by November 1, 1979. (*I. D.*, para. 41). Installation was planned for November 5 through December 7, 1979 (*I. D.* para. 53) during which time KQEC-TV would be taken off the air. (*I. D.* para. 59). In late October, KQEC learned that manufacturing delays would push back delivery several weeks, and in fact, no parts were delivered before the end of November. KQEC-TV went off the air as planned November 5, but returned to the air on December 8 for the annual December fundraising period and remained on the air for the remainder of that month. Further delivery problems were reported in December and the equipment "dribbled in over a period of several months" so that it was 75% delivered by late February. Final delivery occurred on April 18, 1980. KQEC-TV, which had gone off the air again on January 1, 1980, did not resume broadcasting until May 29, 1980. (*I. D.* paras. 61, 66, 81, 87-89).

6. During the period Channel 32 was off the air, KQEC, through counsel, wrote four letters to the Commission, all of which attributed the station's shutdown to the need for and delays in replacement of the switcher equipment. First, and most important, on November 2, 1979, KQEC wrote in pertinent part:

> On behalf of KQED, Inc., the Commission is hereby advised that noncommercial educational station KQEC(TV) will temporarily suspend its operation during the period from November 5 to December 7, 1979, inclusive.
>
> The suspension will enable a master routing switcher to be replaced. The switching system equipment for both KQED-TV and KQEC(TV) is part of the same routing system. The licensee cannot maintain a separate schedule for KQEC(TV) during this installation and will accomplish it so as not to interfere with the operation of KQED-TV, which has the larger audience.

(*I. D.*, para. 62). Thereafter, on December 27, 1979, KQEC wrote that "[s]ince suspending operation, the station has experienced some delays in the shipping of necessary equipment to complete the . . . installation" and "will be unable to return to the air prior to March 1, 1980". (Forum Exh. 6). On February 25, 1980, KQEC wrote that "[A] delay in the shipment . . . has continued, requiring a postponement of the resumption of operations" [until] "the last week in May." (*I. D.* para. 90). Finally, on April 22, 1980, KQEC, making reference to "technical problems" and "necessary repairs", stated that "resumption for KQEC (TV) . . . is estimated to be May 31." (*I. D.* para. 91). Individually and collectively, however, these missives paint a picture at sharp variance with the full circumstances pertaining at KQEC in the latter half of 1979. Those circumstances are as follows.

7. KQED's 1979 fiscal year ended on August 31, 1979 with a deficit of200,000 and it projected an operating deficit of at least 500,000 for fiscal 1980 and perhaps as much as1,000,000. In the fall of 1979, Tiano ordered his staff to study ways of reducing the deficit, including eliminating service on KQEC-TV. (*I. D.* para. 55) On October 19, 1979, he asked for a study of cost savings resulting from extending the KQEC-TV shutdown up to four months and within a week thereafter directed the senior staff to study what savings would be achieved by a deactivation for the last eight months of the fiscal year from January 1 through August 31, 1980. Staff memoranda and discussions from October 26, 1979 forward were based on an eight month deactivation commencing in January 1980. (Forum Exh. 17; Tr. 1089-1090). One staff memorandum dated November 8, 1979 referred to an eight month shutdown of KQEC-TV as "short-term". Various other staff memoranda estimating savings of as much as137,000 in fiscal 1980 were submitted. All of the staff memoranda dealt with savings to be achieved by keeping KQEC-TV off the air, and none with the additional expense of keeping it on the air. Nor did they refer to equipment installation or delays. (*I. D.* paras. 56-57).

8. Tiano left for a month's vacation in mid-November 1979, leaving Jennifer Belt, KQED's Director of Administration and Chief Financial Officer, in charge of KQEC. While he was away, and pursuant to his instructions, the staff continued to study cost savings from deactivation of KQEC-TV for the rest of fiscal 1980. Proposed modifications in KQED's budget were prepared in November and December showing 1980 savings of134,000 from shutdown of KQEC-TV. The notes taken at a senior staff meeting held on December 11 state: "32 in the works to go off 1/80 - as projected." Upon his return in mid- December Tiano, reviewed a staff memorandum proposing overall budget cuts of 500,000 as of January 1, 1980 and his own notes reflect savings of134,000 for "Channel 32". (*I. D.* paras. 70-71).

9. On December 20, 1979, a critical meeting of KQED's Board of Directors took place. At this meeting, the directors formally adopted a resolution noting the necessity of temporarily deactivating KQEC-TV "for continued budgetary reasons" and they authorized a further study of whether the station should be reactivated or disposed of. (Forum Exh. 27, p. 3). Tiano had prepared the resolution *in advance* of the meeting, and it was adopted by the directors without substantial change. (*I. D.* para. 74). Significant also are the minutes of the December 20 directors meeting, which minutes nowhere reflect any mention by Tiano of the switcher replacement or of any extraordinary costs associated with operating KQEC-TV during the replacement process. Tiano testified, however, that technical matters were extensively discussed at the meeting; that he informed the directors that KQEC-TV would be off the air at least until March 1, 1980 in order to install switching equipment; and that he considered the directors' resolution as simply recognizing in the budget Channel 32 savings resulting from continued equipment delivery delays. (*I. D.* para. 75).

10. Tiano's version of the December 20, 1979 directors meeting is sharply contradicted by two other witnesses who attended the meeting. Henry Kroll, an active member of one of Forum's constituent organizations, attended the meeting as an observer and stated that KQEC management informed the directors that deactivating KQEC-TV for the rest of the fiscal year would save an estimated140,000; that there was no discussion of any other reasons for deactivating Channel 32; and that there was no discussion of delays in completing the switcher installation or of the cost of operating KQEC-TV during the installation. (*I. D.* para. 77). Jennifer Belt attended the meeting in her official capacity as Director of Administration. She disputed Tiano's account of the meeting and testified that she would have remembered any discussion of a connection between the equipment replacement and the deactivation of KQEC-TV, because she participated in developing Tiano's proposal to the directors, including having attended a senior staff meeting a few days earlier, and that she knew the proposed deactivation of KQEC-TV was planned and presented *solely* as a deficit reduction action unrelated to the switcher replacement. Belt further testified that the minutes of the directors meeting were consistent with both her understanding and the directors action, as well as prior staff discussions which were " *financial* " and not " *technical* " in nature. (Tr. 1405, 1419, 1422-25; *I. D.* para. 78).

11. The effect of the December 20 directors' resolution was to approve taking KQEC-TV off the air through August 31, 1980 and to delete any further funding for the station for the rest of the fiscal year. (*I. D.* para. 79). On December 31, Tiano sent a memorandum to KQED division heads estimating an operating budget deficit of562,000 and stating:

> At the December 20, 1979 Board of Directors' meeting, we received approval to deactivate Channel 32 for the remainder of 1980. If our budget picture changes for the better, we will reactivate it.

He projected a savings of140,000 from KQEC-TV's deactivation, consistent with previous staff estimates, and made no reference to the equipment replacement. Jennifer Belt testified that Tiano's memorandum was consistent with her understanding of the directors' resolution and management policy regarding deactivating Channel 32. (Forum Exh. 44; *I. D.* para. 97). By January 4, 1980, Belt had begun incorporating the effect of Channel 32's deactivation into KQED's fiscal 1980 budget and in January 1980, KQED staff members exchanged memoranda on savings in electricity from Channel 32's shutdown through August 1980. (*I. D.* paras. 79, 99).

12. In this case, as in all cases involving misrepresentation, the question of witness credibility is present. It is therefore necessary, before addressing the evidence summarized above, to briefly review the controlling principles in this area. It is clear from precedent that the Review Board must give special deference to the ALJ's credibility findings, because only the trier of fact has had an opportunity to observe the witnesses while they are testifying. *Broadcast Assoc. of Colorado*, 104 FCC 2d 16, 19 (1986)(credibility findings of ALJ "entitled to great weight"). Absent extrinsic evidence to the contrary, the ALJ's judgment therefore merits great deference and, accordingly, his credibility determinations will be upheld unless his findings patently conflict with the other record evidence. *Telestar, Inc.*, 2 FCC Rcd 5, 12-13 (and cases cited therein) (Rev. Bd. 1987). Here the ALJ held that "all witnesses . . . were, in general demeanor and in- the-main, forthright . . . . [I]t was the witness Belt, a former principal of KQED, forthright, articulate and knowledgeable, wholly without interest or bias in the propositions at bar, however, who gave most telling and credible first-hand

observations, so to speak, of what events and circumstances occurred about and during the relevant time period under the issue." (*I. D.* para. 184). These findings will be accorded due weight herein.

13. The internal activities at KQEC described above at paras. 7-11 were not revealed in KQEC's contemporaneous reports to the Commission. Specifically, its November 2, 1979 letter referenced a need to suspend Channel 32's operation in order to replace a master routing switcher, but did not suggest the consuming and on-going financial dilemma then facing the licensee. By the fall of 1979, KQED had a substantial operating deficit and was projecting a much larger one for the fiscal year. Tiano had therefore ordered staff studies of potential savings from KQEC-TV's shutdown through August 1980; staff memoranda had been prepared on cost savings of an eight month shutdown; and in July 1979, Tiano had studied the prior Commission orders pertaining to KQEC-TV's previous darkening in the mid-1970's, and the Commission's express admonition to the licensee that financial difficulties could not continue to justify remaining off the air. Thus, the November 2 letter did not disclose Tiano's growing intention to shut the station for eight months because of budget problems or his apparent motivation to avoid Commission censure for deactivating again based on financial factors.

14. The November 2 letter also misstated the true facts when it claimed that the licensee could not maintain a separate schedule for Channel 32 during the equipment installation. In fact, Robert K. Diehl, KQED's Manager of Engineering Facilities, Eugene S. Zastrow, its Chief Engineer, and Tiano himself all testified that Channel 32 could have been kept on the air by purchasing a relatively simple switcher ranging from5,000 to 15,000 in cost or renting one at75 to250 a day. (*I. D.* para. 51; Tr. 452, 454, 471-473, 1348, 1822). Although the signal quality might have been poor, it would have been no worse than that which had characterized KQED-TV and KQEC-TV for years. (*I. D.* para. 42; Tr. 745-746). Jennifer Belt agreed that Channel 32 could have maintained a separate schedule during the replacement process. (Tr. 1467, 1552). The staff did not study the cost of keeping the station on the air during the installation, however (Tr. 435, 455), and KQED considered Channel 32's operation its lowest priority, ranking below Channel 9, program production, KQED-FM, and *Focus* magazine, KQED's and KQEC's programming guide. (*I. D.* paras. 49-50; Tr. 696, 1363, 1404). The sum and substance of this evidence is that Channel 32 was taken off the air not for the reasons stated in KQED's November 2 letter to the Commission, but because of financial considerations and the fact that Channel 32 was the licensee's lowest priority.

15. Moreover, KQEC's December 27, 1979 letter to the Commission, representing only that delays in shipping the needed equipment would keep the station off the air until March 1, 1980, was also contrary to contemporaneous events at KQEC. That letter did not mention the budget problems, the staff memoranda on estimated savings from Channel 32's deactivation, or that Tiano had decided to take the station off the air for eight months. And, most significant, it made no reference at all to the resolution voted by KQED's Board of Directors - only one week earlier on December 20 - that Channel 32 be deactivated for "continued budgetary reasons." While Tiano considered the directors' resolution as merely reflecting the budgetary impact of the equipment installation delay, his account is contradicted by the contemporaneous minutes of the meeting as well as by the sworn testimony of Kroll and Belt. Tiano's testimony is therefore rejected as contrary to the more credible and corroborative record evidence. In this regard, it is also noteworthy that Tiano informed the senior staff on more than one occasion that equipment installation was a "good excuse" to give the Commission for Channel 32's anticipated shutdown. (Tr. 1426-1427, 1449-1451, 1459,1555-1556). While the ALJ liberally interpreted Tiano's expression literally to mean "to exonerate" or "free from blame" (*I. D.* para. 184), we are unable to agree with so innocent a reading in view of the strong record evidence reviewed above, particularly the fact that Channel 32 could have been kept on the air during installation of the new switcher and that Tiano had express notice from the Commission's earlier orders that a total shutdown for financial reasons was not - in Tiano's phrase - a "good excuse." This conclusion is also consistent with Jennifer Belt's understanding of Tiano's words (Tr. 1427), and clearly supports the compelling inference that the letters to the Commission were intended to avoid potential FCC sanction.[6]

16. After January 1, 1980, KQEC's pattern of communication to the Commission regarding Channel 32's shutdown was the same. On February 25, it wrote to the Commission that "a delay in the shipment of . . . the new equipment . . . has continued, requiring a postponement of the resumption of operations." There was still no mention of the December 20 directors' resolution, or the dire budgetary problems, or that Channel 32 had - as a matter of fact - *returned* to the air in December, but was then voluntarily deactivated again on January 1, 1980. In contrast to its letter, in an almost contemporaneous directors meeting held February 21, 1980, Tiano reported on Channel 32's deactivation in connection with budget and deficit problems, yet his report to the directors made absolutely no reference to the switcher installation. (Forum Exh. 39). Similarly, in its final communication to the Commission prior to returning Channel 32 to the air, KQEC wrote on April 22, 1980, again citing equipment delivery delays and the need to repair technical problems in the equipment. And, once again, nothing was disclosed about the decision to take the station off the air for eight months to alleviate budget problems.[7]

17. The only external acknowledgement of the Channel 32's deactivation during the period of the shutdown was made indirectly in response to a letter from Henry Kroll. That is, on January 18, 1980, Kroll wrote KQEC protesting the cancellation of Channel 32's programming. A copy of Kroll's letter was sent to the Commission (*I. D.* para. 84). KQEC counsel drafted a response, assisted by Tiano, and signed by Linda H. Clever, KQED's Board Chairman, as follows:

> KQEC was deactivated in November in order to allow installation of new equipment within the station. Due to a delay in the delivery of the equipment, it was necessary to extend the down-time.
>
> At our meeting in December, we authorized staff to leave Channel 32 off-the-air in order to save money. In no event is that expected to last longer than August 31, 1980.

This letter was also copied to the Commission. (*I. D.*, para. 85). Tiano testified that the letter was drafted to provide as little information as possible and to be consistent with KQEC's December 27, 1979 letter to the Commission. (Tr. 1067-1074). The comment "to save money," Tiano stated, referred only to a respite from operating expenses while the station remained off the air. (KQED Exh. 100 at 21-22).

B. ALJ's Conclusions, Exceptions, and Evaluation

18. After making extensive and detailed findings of fact (*I. D.*, paras. 11-106), the ALJ concluded that "there were coexisting reasons" for the darkening of KQEC-TV -- budgetary problems and equipment problems -- and that both should have been reported to the Commission under the "high standards of punctilio" imposed on broadcast licensees (citing *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980)). He further concluded that no misrepresentation occurred because the limited reasons for KQEC-TV's darkening reported to the Commission were literally true - so far as they went - and that lack of candor, which involved a duty of being completely honest, was not an issue in this proceeding. Nevertheless, because KQEC had not been entirely forthright and forthcoming in its "unedifying" communications to the Commission, the ALJ imposed a short-term renewal of thirty (30) months on each of its stations. (*I. D.* paras. 182, 184, 214-217, 220). While Forum, MTP, and the Mass Media Bureau all contend in their exceptions that KQEC-TV's deactivation was solely for budgetary reasons and that a conclusion of misrepresentation should have been reached, KQED submits that the ALJ erred in even finding "co-existing" reasons for Channel 32's darkening and it argues that the budgetary savings were merely a collateral effect of the shutdown, not the proximate cause. As indicated earlier, we disagree with both the ALJ's and KQEC's analyses.

19. KQEC contends that the ALJ's error in confusing cause and effect derives from two erroneous factual findings. The first, at *I. D.* para. 63, is the statement that Tiano had decided by the time of the November 2, 1979 letter to the Commission to deactivate KQEC-TV for eight months, thereby implying that a decision based on budgetary reasons had been made prior to the shutdown for equipment reasons. (KQEC Br. at 9-13). The second alleged error was the ALJ's interpretation (at *I. D.* para. 79) of the effect of the December 20, 1979 directors resolution as authorizing taking KQEC-TV off the air through August 1980, deleting further funding for it for the fiscal year, and necessitating further formal action before it could be reactivated. (KQEC Br. at 14-16).[8]

20. Contrary to KQEC's first point, there is clear demonstrative evidence that Tiano's decision to deactivate Channel 32 was made prior to the November 2 letter. Forum introduced into evidence a copy of the December 1979 issue of *Focus* magazine, the monthly program guide, which contained program listings for its two television stations (KQED-TV and KQEC-TV) from December 1, 1979 through January 3, 1980. (Forum Exh. 60). Although programming is listed for *both* Channel 9 and Channel 32 through the end of December, 1979, *all* routine listings for Channel 32 are inexplicably *dropped* on the January, 1980 dates. (*Id.* at 64-65). Given that *Focus* program listings go to press three weeks before mailing to subscribers, and that the December 1979 *Focus* issue would have reached its audience sometime in November 1979 (Tr. 322-323, 328, 384-388, 394), a decision to drop the Channel 32 listings altogether after December 31, 1979 had to be made considerably earlier -- certainly by late October, 1979. Therefore, the ALJ's finding has specific record support. KQEC introduced no evidence in rebuttal to otherwise explain the total absence of January, 1980 program listings for Channel 32. At the January 15, 1988 oral argument, held in part to further explore this specific point, counsel for KQEC distributed a "Channel 32 Schedule" for January 1-3, which he constructed on the basis of two bits of information. (Tr. 2472). First, counsel noted that elsewhere in the program guide for December the repeat schedule listing indicates that one program - *Yoga for Health* - will not be repeated December 24 and January 1, which it is suggested, would not have been mentioned had no listings at all for January been contemplated. (Forum Exh. 60, pp. 48-49; tr. 2475-6). Counsel further pointed out that the January 1980 *Focus* magazine contains a listing of children's programs for Channel 32 for that month which would seem to contradict the absence of Channel 32 listings in the December *Focus* issue. (Focus Exh. 61, p. 63; tr. 2477-2478). This is a proposition, however, based solely on counsel's interpretation of the data, rather than on inferences drawn from record evidence introduced by KQEC to explain why the routine Channel 32 program listings for January, 1980 were inexplicably deleted. In fact, counsel readily admitted he did not know what the information regarding the repeat and children's listings meant and could only surmise.[9] These two bits of data, whatever their meaning, seem to us far less probative than the sudden - and otherwise unexplained - elimination of *all* Channel 32 programs from the detailed daily program listings as of January 1 in the December *Focus*. When considered in the context of the other evidence summarized earlier pertaining to KQED's financial preoccupation in October 1979 (*see* para. 7, *supra)*, the total absence of January 1980 program listings for Channel 32 in the December 1979 issue of *Focus* is, if not a smoking gun, strong circumstantial evidence that permits of virtually no explanation other than that, by early November 1979, the licensee had absolutely no plans to operate Channel 32 beyond the 1979 calendar year. The die had been cast against Channel 32 long before 1979 had ended.

21. KQEC's contention that the December 20, 1979 directors resolution did not cause Channel 32's deactivation, as the ALJ found, is based largely on Tiano's testimony that the purpose of the resolution was to take advantage of the cost savings resulting from Channel 32's darkening during the equipment replacement process. Tiano's testimony, however, as noted earlier at para. 10, was completely uncorroborated, and, in fact, directly contradicted by the contemporaneous minutes taken of the meeting, by Henry Kroll, who attended the Board meeting, and by Jennifer Belt, the witness found by the ALJ to be most credible. And, as Tiano's replacement during his absence, Belt was the licensee official in the best position to know the true facts. While KQEC relies on Linda Clever's letter to Kroll explaining the directors resolution (Br. at 14-15), this letter was actually written a month-and-a-half later on February 4, 1980, and was copied to the Commission only *after* Kroll disclosed the licensee's decision of December 20 in his letter of complaint, which was also sent to the Commission. Certainly, in the critical four letters voluntarily submitted to the Commission during the period of Channel 32's shutdown, KQEC made no disclosure that it was primarily seeking to save money

during the equipment delays, but steadfastly maintained that equipment problems alone motivated the deactivation. Its directive of December 20 reflects the real basis for the shut-down of Channel 32; the equipment situation was merely a minor contributing factor in the licensee's actions -- in essence, a convenient smokescreen.

22. Nevertheless, the ALJ concluded that KQEC had not engaged in deliberate misrepresentation because its communications to the Commission, while lacking in forthrightness regarding its financial problems, were truthful in that equipment changes also occurred during the period of the correspondence. Buttressing his conclusions were the findings that, as early as July 1978, KQED decided that425,000 could be allocated for a new master switcher, that installation was originally planned for November-December 1979, but was postponed principally due to untimely deliveries of equipment, and that once delivery was made and installation accomplished KQEC-TV returned to the air by May 31, 1980. (*I. D.* para. 175). There is no question that KQEC experienced an equipment problem in 1979 and that it suffered delays in installing its new switcher during the period in question. However, we must agree with Forum that it was the supervening occurrence of a severe budget crisis that preoccupied the licensee and motivated it to deactivate Channel 32. With the sole exception of the testimony of Anthony Tiano, the great preponderance of testimonial and documentary evidence supports this inescapable conclusion. Specifically, staff memoranda from October 26, 1979 onward focused on an eight month deactivation of KQEC-TV in order to reduce the fiscal 1980 budget deficit; the December 20, 1979 directors resolution formalized Tiano's plan to take Channel 32 off the air through August 1980 in order to save approximately140,000; the minutes of the December 20 meeting contain absolutely no mention by Tiano of "equipment problems" in connection with the shutdown; the testimony of Henry Kroll and Jennifer Belt aver that there was no discussion at the meeting of delay in completing the equipment installation as a reason for deactivation; the December 31, 1979 memorandum from Tiano to KQED management confirmed that the December 20 action approved the shutdown of Channel 32 to the end of the fiscal year and projected a 140,000 savings as a result; and Jennifer Belt testified that Tiano's memorandum comported with her understanding of the December 20 Board action and with management policy. And, finally, the telltale December issue of *Focus* - with its absence of any routine January 1980 program listings for Channel 32 - attests to the fact that the decision to deactivate Channel 32 was made independent of the equipment situation and long before significant "delivery problems" could have been foreseen. By falsely reporting to the Commission reasons other than those that were actually motivating the deactivation of Channel 32, KQEC plainly engaged in a willful and knowing misrepresentation.[10]

23. Forum, MTP, and the Mass Media Bureau all take exception to the ALJ's finding that lack of candor was "not an issue at bar" (*I. D.*, para. 214), and that such an issue had to be specifically designated to be the basis for sanction. (Forum Br. at 23-25, MTP Br. at 13-14, Bureau Br. at 12-13).[11] We generally agree with the thrust of these contentions. To begin with, the inquiry contemplated by both the court and the Commission was a broad one. In remanding, the court expressly disapproved of the Commission's previous treatment of Forum's charges and ruled that it was arbitrary and capricious for the Commission to require a more specific showing by Forum of deceptive intent where KQEC had the only access to certain relevant facts; it also held that Forum's documentation adequately raised the question of the truthfulness of KQED's explanations.[12] In response to the Commission's request to the parties to file comments on how it should proceed following the remand,[13] Forum submitted that the issue should determine whether KQEC "concealed from or misrepresented to" the Commission "the causes and reasons for the darkening of KQEC-TV",[14] whereas KQEC suggested that the hearing determine whether KQED "materially and intentionally misrepresented . . . that the shutdown . . . was due to the installation of new equipment."[15] The Commission saw no serious difference in these formulations: "Although KQED, Forum, and the Bureau propose somewhat different language for the issue to be designated, they essentially agree as to the scope of the issue. Thus we need not belabor the choice of language."[16]

24. Secondly, however phrased, the essence of the issue designated here is whether the licensee engaged in deceitful conduct. In *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983), the Commission, in ruling that the distinction between misrepresentation and lack of candor should not be overstated, held that:

> Misrepresentation and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form. [Footnote omitted].

Both infractions include the element of deceptive intent. (*Id.*) The reliability of an applicant and its proclivity to deal truthfully with the Commission is a bedrock prerequisite to a finding of basic character qualification to hold a license. *Character Policy Statement*, 102 FCC 2d 1179, 1188-1191 (1986). Clearly, the essence of the issue designated in this case is whether KQEC attempted to deceive the Commission regarding Channel 32's deactivation. Thus, insofar as the ALJ concluded he could not disqualify KQEC because the words "lack of candor" were not expressly incorporated into the issue's wording, he erred.[17]

25. Historically, as well as currently, the Commission has considered the twin elements of truthfulness and reliability as fundamental character traits necessary to operate a broadcast station in the public interest. The Commission seeks to determine whether the licensee before it is likely to be forthright in its relations with the agency in the future. Thus, misrepresentation and lack of candor in an applicant's dealings with the Commission are serious breaches of trust and undermine the integrity of our processes. *Character Policy Statement, supra*, at 1208-1211. As such, even the most insignificant misrepresentations may be treated as disqualifying. *FCC v. WOKO*, 329 U.S. 223, 227 (1946); *see also Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461-62 (D.C. Cir. 1980). In treating misrepresentation in a given case, however, the Commission may consider mitigating circumstances and has broad authority in fashioning remedies and sanctions. *Character Policy Statement, supra* at 1211; *Janus Broad-*

casting Co., 78 FCC 2d 788, 792-93 (1980), *Walton Broadcasting, Inc.*, 78 FCC 2d 857, 868 n.17, *recon. denied*, 83 FCC 2d 440 (1980), *aff'd without opinion*, D.C. Cir. Case No. 81-1027, decided May 28, 1982. Here, we have concluded that KQEC actively and intentionally attempted to deceive the Commission by representing that its primary reasons for deactivating Channel 32 were other than those involving its budgetary problems.[18] Before turning to the ultimate question of what sanction is appropriate, we must consider arguments of "meritorious programming" offered by the licensee in mitigation.

C. Meritorious Programming

26. The ALJ specified an issue to determine whether the programming of KQED's three stations, through the end of the last completed license term, has been meritorious, and would thus mitigate any adverse conclusions under the misrepresentation issue. He concluded that the stations' programming had been meritorious, but was not mitigating because there was no misrepresentation to offset (*I. D.*, para. 185), and also was not mitigating of the sanction imposed by the ALJ of a short term renewal because "it is grounded in and compelled by the inchoate, pervasive and preeminent duty of a licensee/trustee or fiduciary which has been found wanting, not unlike a putative act of non-feasance." (*I. D.*, para. 218.) Forum, MTP, and the Mass Media Bureau all contend that meritorious programming evidence may not be used to mitigate findings of misrepresentation and that, in any event, the subject programming was not "sufficiently" meritorious to mitigate the misconduct. (Forum Br. at 26-39, MTP Br. at 14-17, Bureau Br. at 14-16). KQEC, of course, argues precisely the opposite. (Br. at 21-24.) We need not review the extensive findings of programming evidence compiled by the ALJ (*I. D.*, paras. 108-145), because we conclude, as a matter of law, that these findings cannot mitigate the particular misconduct on this record.

27. Traditionally, the Commission has permitted applicants to offer evidence of meritorious programming to mitigate findings on certain issues that are potentially disqualifying. The Commission has considered such evidence on the theory that the public interest is better served if the evaluation of an applicant's fitness to continue as a licensee includes consideration of favorable traits as well as deficiencies. For instance, in *Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423 (1980), perhaps the leading recent case in this area, mitigating evidence was received where the licensee had engaged, *inter alia*, in abdication of programming control, promotion of a lottery, misleading advertising, and improper logging. *See also, e. g., Federal Broadcasting System, Inc.*, 70 FCC 2d 55 (Rev. Bd. 1976) (EEO violations); *Trustees of the University of Pennsylvania*, 58 FCC 2d 848 (Rev. Bd. 1976) (adequacy of control of station operations); and *Voice of Charlotte Broadcasting Co.*, 58 FCC 2d 991 (Rev. Bd. 1976) (technical violations). The Commission expressly stated in *Cosmopolitan*, *supra*, however, at 425 n.3, that: "Some forms of misconduct (*e. g.*, misrepresentation, bribery, fraudulent billing) are *prima facie* so serious that a grant would not be in the public interest, no matter how meritorious the applicant's past programming record, and in such cases the Commission will not even consider programming evidence as a mitigating factor." *Accord Immaculate Conception Church v. FCC*, 320 F.2d 799 (D.C. Cir.), *cert. denied*, 375 U.S. 904 (1963); *United Broadcasting Co.*, 60 FCC 2d 816 (1976); *KFPW Broadcasting Co.*, 40 FCC 2d 126 (1973). KQED itself concedes (Br. at 23) that in cases involving "intentional wrongdoing" or "moral turpitude," the Commission refuses to consider evidence of "meritorious programming". In this case, involving as it does a clear issue of misrepresentation, there is little question that we are bound by *Cosmopolitan* and its antecedents, and therefore conclude that it was error for the ALJ to permit programming evidence in mitigation of KQED's intentional misrepresentations.

28. Nevertheless, the ALJ and KQEC both rely on a single case precedent to support their position to the contrary, *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). This case does not, in our view, represent a change in the Commission's traditional policy in this area. In *RKO General*, a case conceded by all concerned to be unique and unprecedented (*id.* at 235), the Commission denied RKO's renewal applications for its television stations in Boston, New York, and Los Angeles on several grounds, but the court of appeals affirmed only the Boston result, because of the licensee's lack of candor in that specific proceeding. The court then remanded the New York and Los Angeles proceedings, holding that the other renewals there could not be denied simply because they were conditioned on the outcome of the Boston case. Noting that the Commission, in designating for hearing RKO's thirteen other broadcast stations, permitted the licensee to introduce meritorious programming or other mitigating evidence with regard to those stations,[19] the court stated that "each of RKO's renewal applications arises in different contexts and presents different levels of complexity," and that "individual stations have different broadcast histories and policies," and are thus entitled to argue that they deserve different treatment than RKO's Boston station. *Id.* at 236-237. We note first, contrary to KQEC's position, that this language seems to go beyond the impact, *vel non*, of "meritorious programming" evidence to address the ultimate question of sanctions and remedies which, as the Court recognized, is a matter in which the Commission has "broad latitude." *Id.* at 237. Furthermore, in this regard, it is important to observe that RKO's Boston license had already been denied and that the Commission and court were addressing what impact this finding should have on RKO's *other* stations, particularly in view of their separate histories.[20] At minimum, then, KQED may not rely on *RKO General* to support the introduction of programming evidence to mitigate a finding of misrepresentation involving KQEC-TV. Moreover, unlike the special factual circumstances involving RKO's disparate holdings and separate and distinct operations, KQED's three stations are co-located with the same management, and substantially the same policies and practices. In particular, Channel 32 and Channel 9 operate as fully integrated, complementary television services. (KQED Exh. 14, p. 1; *I. D.* para. 14). Finally, and most important, in its recent *Character Policy Statement*, *supra*, at 1211 n.79, the Commission reiterated its traditional view that "in cases of misrepresentation we are not required to consider the station's past program performance." This *Policy Statement*, which both postdates the *RKO General* decision by several years and specifically addresses problems arising in that unusual proceeding, confirms the Commission's belief that, in cases such as the one at bar, "meritorious programming" evidence is inappropriate, and we therefore adhere to this view. We turn now to the final question of what sanction is required in this case.

D. Sanction

29. At the January 15, 1988 oral argument, the parties were requested to file supplemental briefs addressing the question of whether a finding of misrepresentation would require denial of all three of KQED's broadcast licenses (Tr. 2511-2512):

> [I]f [the Review Board] find[s] actionable misrepresentation on the part of KQE[D], Inc., [is it] then bound by operation of law or by precedent to not renew both Channel 9 and Channel 32 and, by extension, the FM station?

KQED and the Mass Media Bureau filed responsive briefs on February 1, 1988 and replies were filed by KQED and Forum on February 17 and 19, respectively.

30. The Mass Media Bureau, supported by Forum, is of the view that "KQED is guilty of misconduct so fundamental to a licensee's character that it affects its qualifications to hold any station license" and that therefore all three renewal applications should be denied. (Br. at 6-7). The Bureau states, citing *RKO General, Inc. v. FCC, supra*, that lack of candor is the kind of licensee misconduct whose seriousness affects its qualifications to hold any license. The Bureau also relies on *Star Stations of Indiana, Inc.*, 51 FCC 2d 95, *aff' d sub nom. Star Broadcasting, Inc. v. FCC*, 527 F.2d 853 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992 (1976) and *Alabama Educational Television Commission*, 50 FCC 2d 461 (1975), as examples of cases where misconduct was so fundamental that broadcasters were utterly disqualified from licenseeship of all of their stations.

31. KQEC, on the other hand, argues that Commission precedent establishes that its licenses are severable and that the Commission has broad discretion in choosing appropriate sanctions in a given case. Relying on the *Character Policy Statement, supra*, and *RKO General, Inc., supra*, KQEC maintains "that individual stations of a multiple station owner must be judged separately." (Br. at 17). It also cites *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied sub nom. WWIZ, Inc. v. FCC*, 383 U.S. 967 (1966), among other cases, where the Commission denied a group owner's license for one station while renewing its other stations. It argues that the conduct of record in this case was limited to the operation of one station during a discrete period of time, and is an isolated incident in KQED's 35 year history of outstanding public service.

32. Forum replies that the misrepresentation in this case is not an isolated event, but a still-continuing course of behavior over a ten year period in that the licensee continues to cover-up the reasons for KQEC-TV's deactivation in 1979 and 1980. In these circumstances, Forum submits, all of KQED's license renewal applications must be denied. KQED replies that the Bureau " has lost all sense of perspective" and unfairly "lump[ed it] with the worst miscreants in FCC history." (Reply Br. at 1-2). It maintains that the misconduct in the cases relied on by the Bureau is not parallel to anything found in the record in this case and that KQED's voluntary and truthful reporting to the Commission should not result in having its licenses taken away.

33. The Commission, of course, has broad discretion in its choice of remedies and sanctions in the area of misrepresentation and lack of candor, and will accordingly consider all the facts of a given case before deciding as to the appropriate disposition. *Character Policy Statement, supra*, at 1210- 1211; *RKO General, Inc. v. FCC, supra*, at 237; *Leflore Broadcasting Co. v. FCC, supra*, at 463; *Lorain Journal Co. v. FCC, supra*, at 831. In determining the weight to be accorded specific acts of misconduct, the Commission has traditionally considered the wilfulness, frequency, and currency of the behavior, as well as its seriousness, the participation of station managers and owners, and other relevant factors. *Character Policy Statement, supra*, at 1227-1228. The Commission's purpose in making character evaluations is not to punish misconduct, but to assure that those granted licenses will be truthful in their dealings with the Commission and reliable station operators. *Id., RKO General, Inc. v. FCC, supra*, at 232; *FCC v. WOKO, Inc., supra*, at 228. Of necessity, the Commission relies heavily on the truthfulness, accuracy, and completeness of submissions made to it by applicants who, in turn, have an affirmative obligation to provide the Commission with the facts needed to carry out its statutory mandate. *Sea Island Broadcasting Corp. v. FCC*, 627 F. 2d 240, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980); *RKO General, Inc. v. FCC, supra*, at 232. As the Commission has said, "no one is allowed 'one bite' at the apple of deceit." *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973). Of course, these general precepts must be fleshed out and judiciously applied in individual cases.

34. The Commission has also recently clarified its policies regarding the particular problem presented in this case, that is, what effect a finding of misconduct at one station should have on other commonly-owned stations. Specifically, the Commission rejects the presumption, apparently favored by the Mass Media Bureau in this case, that misconduct at one station is necessarily predictive of the operation of the licensee's other stations. While some conduct may be so basic to a licensee's operation that it is relevant to its qualifications to hold any license, that is a factual determination to be made in individual cases. Proper operation of its other stations is itself evidence of a licensee's capacity to operate in the public interest. *Character Policy Statement, supra*, at 1220-1224. "Suffering the loss of one station, with the costs thereby imposed, will likely serve to deter all but the most unrepentant from serious future misconduct. Only in the most egregious case need termination of all rights be considered." *Id.*, at 1228.

35. Returning to the facts of the case at bar with these general principles in mind, we have found that the record in this proceeding reflects that, in its communications to the Commission, KQEC did not merely fail to state the full facts, its letters were affirmatively misleading. That is, KQEC reported developments pertaining to its delayed equipment installation which, however technically accurate, were, in the ALJ's words, "hardly edifying." KQEC's representations revealed no aspect of the financial concerns which were the transcendent preoccupation of the licensee, and it was those financial concerns which the record unmistakably establishes as the motivating factors in Channel 32's shut-down. In other words, while there is evidence, as chronicled by the ALJ, of equipment problems during the period of KQEC-TV's darkening, and reported as such to the Commission, the great preponderance of the record evidence confirms that vital financial considerations, *deliberately not reported*, were at the heart

of the decision to remove Channel 32 from the air. The wilfulness of the licensee's behavior, the involvement of its top management in the person of Mr. Tiano, and the seriousness of its decision to eliminate service on KQEC-TV over a six month period for reasons other than those reported to the Commission, constrain us to conclude that the licensee's conduct should result in denial of its renewal application for KQEC-TV. On the other hand, and without taking account of programming evidence, there is no indication whatever in the record that KQED- TV and KQED-FM have ever engaged in, or been the subject of, comparable misconduct. The licensee's operation of these two stations is not the subject of any specific complaint here, nor is there reason to believe from the record before us that the licensee has similarly misinformed the Commission on the status of those two stations or would be inclined to repeat its misconduct with regard to those stations. Indeed, the record supports a conclusion that the imperative priority placed on the operation of these stations would, and did, lead the licensee to keep them on the air, despite its deep financial troubles throughout the 1970's. And there is no record basis to predict that this dedication would diminish in the future. The evidently greater devotion with which the licensee has treated KQED-TV and KQED-FM may also derive from the fact that they have been broadcasting and providing public service longer than KQEC-TV (KQED-TV from 1954 and KQED-FM from 1969) and the fact that KQED was the first licensee of its kind to develop public broadcast station "members," the first to air a daily news show, to cover local issues live, and to produce local programs having national appeal. (*I. D.* paras. 13-14). Thus, in a broad sense at least, the misconduct here was "isolated" in that it pertained exclusively to Channel 32, without impact on the operation of the others and, as such, it is fitting that the sanction of non-renewal should apply to KQEC-TV alone. *Cf. Gross Telecasting, Inc*, 92 FCC 2d 204, 243-246 (Rev. Bd. 1982), *rev. denied*, FCC 83-443, released November 21, 1983.

36. Moreover, the precedent cited by the parties before us lends further support for our conclusion that this is not the kind of "egregious case" for which the Commission reserves the ultimate sanction of removal of all licensee rights. *RKO General, Inc. v. FCC, supra*, relied on by the Bureau, clearly stands for the proposition that even a record of serious lack of candor will necessarily terminate only licensee rights in the proceeding in which it occurred, and will not dictate automatic non-renewal of corporately co-owned stations. *Star Stations*, also relied on by the Bureau, is hardly apposite. That case involved "pervasive and continuing" misconduct in the operation of the licensee stations involving improper campaign contributions, slanted news broadcasts, and misrepresentations in addition to deliberate attempts to frustrate the Commission's processes by intimidating and harassing employees and former employees, in short a "reprehensible course of misconduct" destroying any confidence of the licensee's ability or willingness to minimally comply with the public interest. *Id.*, at 97, 109. Likewise, we are also cited to *Alabama Educational Television Commission, supra*, another case with no apparent parallel to this proceeding, where all licenses were denied because the licensee followed a conscious policy of racial discrimination in its overall programming so as to pervasively neglect a black minority which consisted of approximately thirty percent of the population of Alabama. *Id.*, at 477. On the other hand, in *KFPW Broadcasting Co.*, 47 FCC 2d 1090 (1974), where a licensee made secret payments to network officials solely to help obtain improved network affiliation agreements, the Commission denied renewal of only the station at which the misconduct occurred, but it renewed the licensee's other station because of the absence of evidence of misconduct there and the unlikelihood that the misconduct would be repeated. *Id.* at 1092-1096. Similarly, in *Lorain Journal* Co. v. FCC, supra, where a licensee engaged in an unauthorized transfer of control of a broadcast station and also filed misinformation and withheld information from the Commission in that regard, in addition to engaging in technical violations and fictitious logging at the station, the Commission's sanction of nonrenewal did not extend to a co-owned station apparently uninvolved in the misconduct. Id. at 826, 830-831. *See also Faulkner Radio, Inc.*, 88 FCC 2d 612, 616-618 (1981) "isolated context" of misconduct, albeit involving a strike petition and misrepresentations, contributes to limiting nonrenewal to single station); *United Broadcasting Co., Inc.*, 100 FCC 2d 1574, 1585 (1985) (renewal granted station having record "without significant blemish" despite non-renewal of other co-owned stations because of past misconduct); *WI00, Inc.*, 95 FCC 2d 974, 979-980, 983-984 (1983) (past disqualification based on submission of false jurats and improper investigatory tactics does not extend to co-owned station where misconduct was limited to prior proceeding and was not repeated). We cannot say that the misconduct in the present record exceeds that reported in these renewal cases or warrants any greater sanction.

37. In short, past Commission precedent as well as current policy make clear that the ultimate sanction of removal of all licensee rights is reserved for cases of egregious misconduct evincing a pervasive unwillingness or inability to meet the basic responsibilities of a licensee. While we have not stinted in our description of the actionable conduct in this case, we do not think it approaches the above definition or in any way approximates those cases where non-renewal of all co-owned stations was justified. We also have little doubt that the loss of KQEC-TV will serve to deter any serious future misconduct at KQED-FM and KQED-TV. Accordingly, the licenses for the latter stations will be renewed for the current terms.[21]

MTP -- Financial Availability Issue.

38. An issue to determine whether MTP has "reasonable assurance" of the availability of funds needed to construct and operate the proposed station was specified in this proceeding, because MTP had represented in its application (see FCC Form 340, Exhibit 5) that it was relying upon grants for its proposed station from the National Telecommunications Information Agency (NTIA) and an unspecified state agency, but had failed to show that it had actually filed its grant requests with those two funding agencies. The ALJ found under this issue that: (1) MTP proposed to meet its estimated construction and operating costs[22] from funds supplied by NTIA and the California Department of Education;[23] (2) that it first filed its grant application with NTIA in January 1986 (MTP's construction permit application was filed November 1, 1983); (3) that NTIA responded in February 1986 by sending MTP a deficiency notice requesting additional information; (4) that MTP amended its grant application on February 28, 1986 (albeit putatively not addressing all of NTIA's cited deficiencies); and (5) that MTP requested NTIA on March 17, 1986 to defer its grant application until the next fiscal

year. I.D., paras. 164-166. He concluded that MTP was financially unqualified, opining that its reliance on NTIA funds is "little more than conjectural" (I.D., para. 199) and its assurance "greatly less than 'reasonable.' Id. at para. 203. He added that MTP's grant application with NTIA was "incomplete," that NTIA had not granted MTP any funds, and that MTP had not filed any grant application for the California funds.

39. MTP objects to the ALJ's findings and conclusions, contending that Commission policy merely requires noncommercial applicants relying upon NTIA and state grants to certify that they are relying on such funds. *See Public Notice*, released December 13, 1982, *Application Forms*, 52 RR 2d 1362 (1982). It points out that the *Public Notice* expressly states that "no further action on [the applicant's] part is required" (other than certification) if relying upon NTIA funds; and, if relying upon state funds, applicants are simply to "advise the FCC when the funds are committed or appropriated." 52 RR 2d at 1364. Furthermore, in response to the putative deficiencies cited in the I.D., MTP claims that the state agency only requires an applicant to file a Notice of Intent to file a grant application, which it has done, and the Notice of Intent formally initiates the state grant process. It adds that at the later invitation of the state, the remainder of the grant cycle is completed. MTP also challenges the conclusion that its grant application to NTIA was "incomplete" or that any adverse implication can be derived from the fact that no funds have yet been granted by NTIA. On the former point, it argues that it is inappropriate for the ALJ to substitute his judgment for that of NTIA regarding potential deficiencies, and that in any event, based on the testimony of a former NTIA employee presented by KQED, the deficiencies are curable, citing to Tr. 1979. And, with respect to the finding that NTIA has not yet given it any funds, MTP asserts that it is NTIA policy not to fund a grant application unless and until an applicant receives a construction permit from the Commission. Finally, MTP cites *Arizona Number One Radio, Inc.*, 103 FCC 2d 550, 553-557 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 44 (1987), *aff'd sub nom. Interstate Broadcasting System of Arizona, Inc. v.* FCC, No. 87-1060 (D.C. Cir., filed January 25, 1988), as support to demonstrate that the Commission has previously exhibited flexibility to a sister federal agency where, as here, a regulatory gridlock occurs and each agency's policy is to await action from the other before issuing its final determination.

40. The Mass Media Bureau also objects to the ALJ's resolution of this issue, contending that MTP's inability to make a detailed pre-grant financial showing should not disqualify MTP from this proceeding. It argues that the Commission recognizes that educational applicants frequently depend, "to some extent, on community fund raising drives, subscriptions, federal and state grants or combinations thereof," and that greater leeway is therefore accorded the educational station because of its very nature. (Med. Bur. Br. at 9). The Bureau maintains that MTP has fulfilled all of the requisite requirements. It notes, too, that MTP filed a copy of its NTIA application with the State of California Clearing House and that the state verified that MTP has complied with the state review process. The Bureau asserts that even the worst case scenario -- the educational applicant is denied grant funds after the Commission has awarded it a construction permit -- outweighs the alternative of precluding many worthwhile educational television endeavors by applying to noncommercial educational applicants the same stringent financial requirements generally applied to commercial applicants. Finally, the *amici* essentially endorse in their brief, *see* note 3, the position taken by the Bureau. They contend out that the principal problem adversely affecting increased minority ownership is access to financing and argue that the Board should not compound this condition by adhering to an "unreasonably" high standard.

41. In the final analysis, we are unable to hold that MTP has not met the Commission's current financial requirements for noncommercial broadcast applicants who signify in advance an intent to rely upon NTIA and state funding for construction and start-up expenses. Although no Commission text expressly differentiates between the ordinary "reasonable assurance" standard applied to commercial broadcasters, *see e.g., New Financial Qualifications Standards for Broadcast Television Applicants*, 72 FCC 2d 784 (1979) (applicants must, *in advance*, demonstrate construction and 90-day revenue cushion without reliance on advertising revenues); *see also In the Matter of Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, FCC 87-97, released March 19, 1987 (Public Notice), and the same "reasonable assurance" standard as applied to those noncommercial applicants indicating a prospective reliance on NTIA and/or state funding, we must infer from the inherent difference in underlying circumstances that an altogether different *practical* standard obtains to applicants in the latter category. That is, absent some collateral condition which raises substantial questions as to whether NTIA (and/or a state funding agency) will act unfavorably on the funding requests of that particular applicant, the Commission appears content to assume for its own licensing purposes a favorable disposition on the noncommercial applicant's federal (and/or state) funding requests. The Board readily concedes that the Commission has nowhere spelled out this unusual assumption. But, at the same time, it has nowhere advised noncommercial broadcast applicants of any requirement to demonstrate *alternative* funding, should the applicant's proposed federal (and/or state) funding fall through, in whole or in significant part. So far as the Board and the Mass Media Bureau are aware, the sole requirement in this vitally important regard is that a noncommercial broadcast applicant indicate at the outset its reliance on NTIA (and/or state) funding; further say not the FCC application form, the detailed instructions thereto, or the various policy statements relating to the general financial qualifications of broadcast applicants.[24] Under these circumstances, we cannot find that MTP has failed to act in accordance with relevant FCC requirements for noncommercial applicants, such as they are. MTP has filed its funding requests, as it indicated it would do when it filed its instant broadcast application with the FCC. And, unless NITA and/or the State of California were to advise that the requested MTP funding will be denied, in whole or in significant part, the matter of MTP's "reasonable assurance" of adequate financing is - at this point - simply beyond a more definitive prognosis. In that respect, the Board is acutely aware that there is no small irony involved in removing the Channel 32 license from the hands of one noncommercial licensee for reasons *directly* traceable to inadequate financial resources, and then placing that same Channel 32 license in the hands of an applicant which may turn out to be even *less* well financially endowed. But, that is a matter apparently beyond the immediate control of the FCC, which must now await future funding action by NTIA and the State of California.

Should MTP fall financially short, we have no doubt whatsoever that the Commission will rise up and take timely and appropriate action. *See , e. g., Metrovision, Inc.*, 2 FCC Rcd 1907 (1987), *recon. denied*, DA 88-126, released February 10, 1988.

Motion to Enlarge Issues

42. By *Memorandum Opinion and Order*, FCC 86M-1384, released April 22, 1986, the presiding ALJ denied a motion filed by KQED[25] seeking issues against MTP to explore a false financial certification and "forged" signature of Bonnie Asano, MTP's Secretary, on MTP's application. The request for the false certification issue was grounded on the allegation that MTP had not filed grant applications with NTIA and the State of California (on which it was relying for construction and start-up funds, *see* paras. 38-41, *supra)* at the time it certified its FCC application as to its financial viability. The ALJ observed that the filing delay did not constitute a misrepresentation because MTP's financial certification was expressly qualified as "contingent upon a grant from NTIA and the state." *Memorandum Opinion and Order, supra*, at para. 10. He added that the applicant had never made a representation "that such applications had been filed or would soon be filed." *Id.* With respect to the "forgery" facet of the motion, the ALJ reproved KQED for its characterization of MTP's behavior, pointing out that forgery is a crime and "crimes *qua* crimes, are not tried in these premises." *Id.*, at para. 11. He found "that little more occurred in affixing the signature of MTP's Secretary than [Asano] was called away on an emergency with instructions to have her signature placed on the application if she did not return." *Id.* The ALJ concluded that the placing of her signature on the application "worked no fraudulent deceit to her or unduly prejudiced anyone, including this agency," and that Asano "appears in every way to have ratified and adopted whatever act has been made in her name." *Id.*

43. KQED contends that the ALJ erred in failing to add the two issues in question. It charges that MTP's financial certification was false in three respects: (1) MTP had not filed its grant applications at the time it filed its FCC application containing the certification; (2) MTP certified in its FCC application that it had reasonable assurance of present commitments from donors, parties furnishing funds, loans by banks or financial institutions, or equipment suppliers; and (3) MTP certified that it had sufficient net liquid assets on hand or available from committed sources to finance its construction and start-up costs. Moreover, KQED claims that MTP did not take any steps to establish the cost of construction until after its certification was filed. With respect to the "forgery" issue, KQED argues that the Board has previously concluded, when confronted with a false signature, that it "follows that the [applicant has] pursued a conscious course of misrepresentation," quoting from *American International Development, Inc.*, 75 FCC 2d 109, 128 (Rev. Bd. 1979), *modified*, 86 FCC 2d 808 (1981). Alternatively, KQED argues that, in any event, MTP's behavior violated Section 73.3513 of the Commission's Rules requiring applications to be signed by a principal of the applicant. Both MTP and the Bureau contend that the ALJ was correct in denying the issues.[26]

44. We agree with the ALJ that there was no adequate basis for a false certification issue in light of the express language in MTP's application that its funding is contingent upon grants from NTIA and the State of California. The other representations highlighted by KQED, *i. e.*, "present commitments" and "assets on hand," must be read in the context of the qualification above. MTP elucidates in its Reply Exceptions that, as of the date of the filing of its application, the Commission had not yet issued a noncommercial application certification form, and thus MTP utilized the boiler plate standard commercial certification language while adding the qualifying language to show specifically that reliance was being placed on state and federal grants. It is clear that the Commission was neither misled by MTP's certification nor understood MTP to have represented that it already had commitments of funding or funds already on hand; that is, the Commission expressly noted in its first *Hearing Designation Order* that MTP was relying on funds from NTIA and a state agency. We further agree with the Bureau and MTP that there is no reason to explore whether MTP failed to prepare cost estimates prior to certification. Both point out that KQED's contention was premised on the deposition testimony of only one MTP principal that she *personally* did not make any inquiry about the cost of equipment until after the certification. In contrast, MTP's Chief Financial Officer averred that the applicant was provided with the necessary cost estimates prior to the filing of the application. (*See* Supplement filed April 24, 1986 to MTP's opposition to motion to enlarge issues.)

45. Furthermore, the ALJ properly refused to add an issue predicated on the "forgery" allegation. As the ALJ observed, no " *malo animo* on anyone's part appears" in affixing Asano's signature to the application. *Memorandum Opinion and Order, supra*, at para. 11. Rather, Asano volunteered in her deposition testimony that the actual signature affixed to the application was not hers. She went on to explain that on the day the application was scheduled to be sent by mail to Washington she was called away from the office by a personal emergency, after reviewing the application which was complete except for the signature (*i. e.*, she wanted MTP's President to review it before she signed it), and she, therefore, authorized her attorney to affix her (Asano's) signature to the application in the event she was unable to return to the office before the application had to be mailed. Like the ALJ and the Bureau, we have no reason to doubt her veracity. Apparently, she freely volunteered the information during deposition prior to any question having been raised regarding this matter; and no questions, except the false certification matter discussed, *supra*, have been raised concerning the accuracy of the information submitted in the application. KQED's reliance on *American International Development, Inc., supra*, is misplaced. In that case, the Board found that the applicant and her husband had testified falsely that the applicant had personally affixed her signature to the application and related exhibits. Here, by way of contrast, the MTP principals never denied that Asano did not personally sign the application and related documents, and, indeed, Asano brought forward the information to the forum in the first instance. In sum, we find that there is not a sufficient predicate for granting the relief requested.

46. Before leaving this matter, however, we note that the affixation of Asano's signature on the application and related documents by an outside party technically violated both the Commission's signature rule, 47 CFR §73.3513, which identifies the individuals who must sign applications, amendments, and related statement of fact, and Section 319(a) of the Communications Act of 1934, as

amended, which prescribes that applications shall be signed by applicants. *See Jane A. Roberts*, 29 FCC 141, 149-150 (1960). In *Roberts*, the Commission held that the affixation of an applicant's signature to an application by her husband, a non-party, pursuant to a mistaken belief that he was empowered to do so, "resulted in a validly pending application although [statutorily] defective insofar as grant was concerned." 29 FCC at 150. Concluding that the statutory defect could be cured by later amendment,[27] the Commission in granting the application simultaneously directed the applicant to file a *nunc pro tunc* amendment conforming its application with the requirements of the Commission's rule. A similar amendment is likewise required here. MTP appears to have been aware earlier that a curative amendment would be required, since it represented in its April 21, 1986 opposition (at p. 11) to KQED's request for this issue, that it would file an appropriate petition for leave to amend. Apparently, however, it never filed such an amendment. MTP, therefore, will be required to do so now[28] as a condition to the grant of its application.

Miscellaneous

47. Although not decisional, two aspects of the ALJ's analysis require a brief comment because of the public interest concern expressed by the Civil Rights Groups in their *amicus* brief, and MTP in its exceptions, that some of the ALJ'S language could discourage minorities from applying for future noncommercial educational broadcast permits. The first matter relates to the ALJ's discussion concerning the "representativeness" of MTP's governing board. He concluded that the "representativeness" of the board left much to be desired, but that this "imperfection" was curable, and he suggested that if MTP's application were granted, the "imperfection" would need prompt attention as a condition of grant. *I. D.*, para. 204. Both the *amicus* and MTP interpret the ALJ's language as a finding that a 100% minority-controlled noncommercial educational applicant is *per se* an "imperfection" and, indeed, may contravene the FCC's licensing standards. We are of the view that both MTP and the *amicus* have read too much into the ALJ's cautionary language. Section II, Question 10, of FCC Form 340 requires nonprofit organizations that are not governmental bodies or educational institutions to show that their officers, directors, and members of the governing board are *broadly representative* of the educational, cultural and civic groups in the community. Because MTP had failed to provide this requisite information in its application, a "representativeness" issue was specified against it. *Memorandum Opinion and Order*, FCC 86M-1048, released March 24, 1986. The issue, however, was not concerned with whether the applicant's governing board was comprised of minorities or not, but rather whether the board was representative of all of the groups above. And, on this narrow inquiry, the ALJ concluded that MTP's showing was marginal, although not disqualifying. *See I. D.*, para. 204. We note in this regard that the *I. D.* repeats MTP's claim that its governing board includes a past or present affiliation in 12 of 15 categories comprising the San Francisco organizations. *See I. D.*, para. 167. We therefore perceive no necessity for placing a "representativeness" condition on MTP's grant, and affirm the ALJ's resolution of the issue in MTP's favor.

48. The second matter centers on language by the ALJ that "a specialized or heavily minority-oriented format is the very antithesis of a *noncommercial educational* aspirant for public franchise." *Id.*, at para. 208. Both the *amicus* and MTP interpret this language to mean that proposals to provide a minority format over a public station are potentially disqualifying and cannot legally serve the public interest. The *amicus* brief urges the Board to reverse the ALJ's negative evaluation of such proposed service and convert it into a substantial credit. KQED agrees in its comments that the ALJ's observation is erroneous, if penalizing minority programming is what the ALJ actually had in mind. We, too, would certainly agree. The Commission has long recognized that "[a]dequate representation of minority-viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1981). KQED argues, however, that the ALJ's observation was actually an articulation of his conclusion that MTP's efforts in determining the community's needs were minimal, resting primarily on *inter se* discussions of its board members. This may be, since the ALJ's language was qualified by the further comment that "[a]ll *significant* audiences whatever their make-up, including minorities, are to be served . . . whatever their disparate needs, tastes, interests, culture and education; and not certainly, *incidentally*, which is the proposal of MTP." *I. D.*, at para. 208. Moreover, the *I. D.* quotes language from MTP's proposed findings that implies that MTP might ignore the needs and interests of the other minority groups in its service area as a matter of policy. Specifically, MTP:

> proposes 'to broadcast a specialized format of programming *by and about Black Americans* that is not currently available' in its proposed service area. . . . this is programming *conceived by Blacks* which may be *produced and/or written and edited by Blacks pertaining to topics of interest to Black communities* and also designated as potentially informative to non-Black audiences as well. [MTP Proposed Findings at 34-35.]

I. D., at para. 207. At the first oral argument on July 10, 1987, the Board asked counsel for MTP whether MTP's proposed findings were to be taken literally, and only blacks employed by the station, or whether (for example) Hispanics or Asians would be precluded from getting a job in management, writing, or editing at the proposed station. Tr. 2252-2253. MTP's counsel explained that in terms of staffing and other considerations, it would not exclude others and that it was proposing a substantially minority format in terms of programming. Tr. 2255. The Board responded (Tr. 2256):

> You say 'substantially' and I think what obviously prompted my question is that the language as written sounds exclusionary and not inclusionary. In other words, had you said 'substantially' in that language, I don't think anybody would have raised the question and I certainly would not have.

In sum, although we could not have granted the *amicus* prayer that MTP be awarded a comparative preference for its minority format, had the case turned on the applicants' respective comparative showings (*i. e.*, MTP did not seek such credit), MTP, likewise could not have been penalized for proposing such a format.

49. ACCORDINGLY, IT IS ORDERED, That the request for leave to tender amicus comments, filed February 12, 1987, and the request for leave to participate as amici curiae or in the alternative to be granted leave to intervene, filed March 26, 1987, by the National Black Media Coalition, National Association for the Advancement of Colored People, and National Association of Black Owned Broadcasters, ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects; and

50. IT IS FURTHER ORDERED, That the motion to accept late-filed pleadings, filed May 1, 1987 by Minority Television Project, Inc. IS GRANTED; that the petition for leave to amend, filed June 5 and supplemented June 8, 1987, by Minority Television Project, Inc. IS GRANTED, and the amendment IS ACCEPTED; that the contingent petition for leave to amend filed June 8, 1987, by Minority Television Project, Inc. IS GRANTED, and the amendment IS ACCEPTED; and that the petition for leave to amend, filed November 30, 1987, by Minority Television Project, Inc., IS GRANTED, and the amendment IS ACCEPTED; and

51. IT IS FURTHER ORDERED, That the applications of KQED, Inc. for renewal of license of noncommercial educational stations KQED-FM (File Nos. BRED-237, BRED-800801ZS and BRED-830801WD) and KQED-TV (File Nos. BRET-25, BRET-800801LQ, and BRET-803801LK) ARE GRANTED, and the application of KQED, Inc. for renewal of license of noncommercial educational station KQEC-TV (File Nos. BRET-203, BRET-800801LV, and BRET-830801LJ) IS DENIED; and

52. IT IS FURTHER ORDERED, That the application of Minority Television Project, Inc. (File No. BPET-831101KI) for a construction permit to establish a new noncommercial educational television Station on Channel 32, San Francisco, California IS GRANTED, subject to condition that Minority Television Project, Inc. file an amendment, *nunc pro tunc*, to its application to conform that application with the requirements noted in paragraph 46 of this Decision.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Further detail on the history of this proceeding appears in *KQED, Inc.*, FCC 85R-34, released April 26, 1985 (reinstatement of dismissed MTP application).

[2] The reasons for partial rehearing of oral argument are set out in *KQED, Inc.*, 2 FCC Rcd 7408 (Rev. Bd. 1987).

[3] On March 26, 1987, the National Black Media Coalition, the National Association for the Advancement of Colored People, and the National Association of Black Owned Broadcasters requested leave to participate as *amici curiae* or in the alternative, to intervene, and jointly filed a brief addressing issues they believe are raised by the *I. D.* in connection with MTP's application pertaining to minority ownership, minority programming, and financial qualifications of minority applicants. While these petitioners have not satisfied the standards of 47 CFR 1.223 governing party intervention, nevertheless, in accordance with past Commission practice, we will accept their *amicus* brief and consider the comments therein. *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018-1019 (1981); *aff d sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (1982); *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262 n.3 (1982).

[4] The station was donated to KQED by Metromedia in 1970 and began operations in June 1971. (*I. D.*, para. 21).

[5] The Commission stated that while it "is not unsympathetic concerning the financial difficulties encountered by KQED, to allow the channel to lie fallow any longer would be an egregious disservice to the public." 57 FCC 2d at 269. It deferred KQEC-TV's renewal and stated: "The licensee is warned that failure to resume broadcasting could result in dismissal of KQEC-TV's renewal application, cancellation of authorization, deletion of call letters or other appropriate sanction." 57 FCC 2d at 270 n. 8.

[6] Tiano conceded that the December 27 letter was also inaccurate insofar as it represented that KQEC-TV had been continuously off the air and for technical reasons could not return, since in fact the station had returned to the air from December 8 to December 31, and was broadcasting on the very date of the letter. (Tr. 836-837).

[7] Interestingly, on April 18, only four days earlier, KQEC publicly announced that it had filed an application for STV authority for Channel 32 with the Commission, which confirms the low priority status assigned that station.

[8] At page 8, n.1 of its 35-page opening brief, KQEC states: "For a review of the facts of the darkening of KQEC and the correspondence with the Commission see the Factual Addendum to this document." The referenced chronology is itself eleven pages long. This Addendum does not comport with Commission pleading practice which requires the filing of issue-oriented consolidated exceptions and brief. *See Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 875 (1976) and 47 CFR 1.276(a)(2). Therefore, it will not be separately addressed. We note, in any event, that much of the chronology is contained in the *I. D.* 's findings, upon which we rely, and that KQEC's two key objections to the ALJ's findings are treated in the text heareafter at paras. 20-21.

[9] "Now, I don't know what this means" (Tr. 2477). "[A]nd believe me, I haven't got any explanation for this . . . " (Tr. 2478).

[10] In addition to the overall deception, KQEC's letters contained other specific falsehoods. For example, although its November 2 letter stated that "The licensee cannot maintain a separate schedule for KQEC (TV) during this installation . . . ", in fact its chief engineer, its manager of engineering facilities, and Tiano all testified that the station could have been kept on the air by purchasing or renting a simple and inexpensive switcher. Likewise its December 27 letter falsely represented that the station was still off the air due to equipment delays when in fact Channel 32 had returned to the air in December and remained on until the end of the month.

[11] Despite his language at *I. D.* para. 214, the ALJ was able to conclude that KQEC's lack of forthrightness and failure to observe high standards of punctilio warranted a sanction of a short-term renewal. (*I. D.* paras. 215-216, 220). These terms, however, are traditionally associated with the concept of lack of candor. *See Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136-1137 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127 (1983). Nevertheless, KQED contends that the ALJ erred in imposing an even higher standard on it because of its status as a noncommercial licensee. (Br. at 17-21). There is language in *I. D.*, para. 216, suggesting that the high standards of punctilio expected of all licensees "would seem more so" where a noncommercial franchise is involved. Insofar as the ALJ's decision rests solely on this basis, we agree with KQEC

that no Commission authority has been cited to support holding these particular licensees to higher character standards. Nevertheless, because we conclude that the record below fully establishes misconduct under the designated issue, the ALJ's overstated dictum in this regard is harmless.

[12] *California Public Broadcasting Forum v. FCC*, *supra* at 679-680; *see also Memorandum Opinion and Order*, FCC 85-663, released January 3, 1986, at para. 8.

[13] Mimeo No. 4615, released June 8, 1984.

[14] Forum Comments, filed June 14, 1985, at 2.

[15] KQED Comments, filed June 14, 1985, at 2.

[16] *Memorandum Opinion and Order*, FCC 85-663, released January 3, 1986, at para. 9.

[17] Because we consider the issue as designated broad enough to encompass the misconduct demonstrated on this record, we need not address exceptors' contentions that any misrepresentation issue automatically subsumes lack of candor and that candor is always in issue. In this regard, *compare West Coast Media, Inc. v. FCC*, 695 F.2d 617, 620 (D.C. Cir. 1982) (intent to deceive "should not be discussed by the Commission in the absence of a designated misrepresentation issue") *with William M. Rogers*, 92 FCC 2d 187, 199-201 (1982) (an applicant's "candor" is always in issue).

[18] Forum also excepts to the ALJ's failure to find misrepresentations in KQED's June 25, 1980 pleading in opposition to Forum's petition for reconsideration of the Commission's decision in *KQED, Inc.*, 77 FCC 2d 973 (1980) denying Forum's 1977 petition to deny. (Br. at 9-16). These arguments are largely cumulative and not decisionally significant in that they would not result in modification of the misrepresentation finding already made herein.

[19] *See RKO General, Inc.*, 82 FCC 2d 291, 318 (1980).

[20] Also, at the time the Commission acted, RKO's television applications had been denied not only for lack of candor but on other grounds including unlawful reciprocal trade practices, an issue on which presumably there would be no objection to allowing mitigating evidence of good programming.

[21] This result moots the comparative issue pertaining to Channel 32. See, however, paras. 47-48, *infra*. That issue, involving as it does the apparently novel question of how to weight a renewal expectancy in a noncommercial educational context, is itself troubling and could benefit from further Commission guidance. *See Black Television Workshop of Santa Rosa, Inc.*, FCC 84R-81, released November 15, 1984.

[22] Construction and operating costs were estimated to be467,665 and 158,639, respectively. I.D., para. 164.

[23] NTIA is asked for350,749 and the California Department of Education is asked for275,555. I.D., para. 164.

[24] The *amicus* and MTP respectively suggest that the Board modify the Commission's financial qualifications standard to allow an applicant to include as available funds, estimates it expects from fund drives and, in comparative renewal cases, revenues of the operating public station. We must decline these invitations since the Board lacks such authority. *See, e.g., Horne Industries, Inc.*, 91 FCC 2d 1193, 1196 (Rev. Bd. 1982), *clarified*, 53 RR 2d 1647 (1983).

[25] Second Motion to Enlarge Issues Against MTP, filed March 28, 1986.

[26] Although the Bureau initially supported the addition of the "forgery" issue in its comments filed April 15, 1986, on subsequently reviewing MTP's opposition, which was filed on the same date as the comments, the Bureau agreed that the facts did not warrant the specification of an issue. *See* Bureau's Reply Exceptions, at n.2.

[27] In reaching this result, the Commission relied on *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949), where the Court had held that the Commission could not grant an unverified application where verification was required by statute, but that such statutory defect could be cured by later amendment. The Commission concluded that the absence of signature and verification should be treated equally since both requirements appeared together in the same section of the Communications Act.

[28] Although we do not condone MTP's apparent delay in filing a curative amendment, it is our view that, on balance, the equities justify acceptance of an amendment at this stage of the proceeding. This has been a protracted proceeding and further delay in providing service to the San Francisco area, occasioned by disqualification of MTP on a defect effectively technical in nature at this point, would not serve the public interest.

SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO

I concur in the Board's Decision denying KQEC's license renewal, which is supported by the clear and convincing documentary and testimonial evidence set forth in paragraphs 4-17. See Catoctin Broadcasting Corp., 2 FCC Rcd 2126, 2139-2140 (Rev. Bd. 1987) and Mid-Ohio Communications, Inc., 104 FCC 2d 572, 600-601 n.21 (Rev. Bd. 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-187

In the Matter of

Amendment of Section 73.202(b), RM-6215
Table of Allotments,
FM Broadcast Stations.
(Centerville, Utah)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1988; Released: May 9, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Radio Property Ventures (petitioner), licensee of Station KCGL(FM), Channel 289C2, Centerville, Utah, the Commission considers herein a petition for rule making seeking the substitution of Class C1 Channel 289 for Channel 289C2 and modification of its license to specify operation on the higher class co-channel. Petitioner submitted information in support of its proposal.

2. The substitution can be made consistent with the Commission's minimum separation requirements with a site restriction of 14.7 kilometers (9.1 miles) southwest of the city.[1] The restriction is necessary to avoid a short spacing to the construction permit for Station KUIN(FM), Channel 290C at Vernal, Utah. Petitioner would be required to relocate its current transmitter site.[2]

3. As requested, we shall propose to modify the license of Station KCGL(FM) to specify operation on the higher class co-channel, Channel 289C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Centerville.

4. The Commission believes it is in the public interest to solicit comments on the proposed substitution at Centerville, since it could provide expanded FM service for that community's first wide coverage area FM station. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Centerville, Utah	289C2	289C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 27, 1988,** and reply comments on or before **July 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Howard J. Braun, Esquire
Diane L. Mooney, Esquire
Rosenman and Conlin
1300 19th St., N.W.
Washington, D. C. 20036
(Counsels for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for the proposed site are North Latitude 40-51-46 and West Longitude 112-01-48.

[2] There is an application pending for Station KUIN(FM) to relocate its transmitter site and operate on Channel 290C2. Petitioner's current transmitter site could be utilized for the upgrade contingent upon the grant of license for the site specified in that application. The coordinates for petitioner's current transmitter site are 40-48-29 and 111-53-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-1296

In the Matter of

Amendment of Parts 1, 63, and 76 of
the Commission's Rules to Implement
the Provisions of the Cable
Communications Policy Act of 1984

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 24, 1988; Released: April 29, 1988

By the Commission:

INTRODUCTION

1. By this *Second Report and Order*, the Commission amends the "signal availability standard" currently embodied in its cable rate regulation rules.[1] These rules define the circumstances and conditions under which franchising authorities may regulate the rates charged by cable operators for "basic cable service."[2] Under the revised rules herein, our determinations on signal availability will continue to be based upon predicted Grade B contours and significant viewing measures.[3] The revisions we are adopting herein are limited to modifications, for the limited purposes of the cable rate regulation rules, of the manner in which Grade B contours are counted and the basis upon which significant viewing is determined and to changes in the waiver procedures associated with the signal availability standard. These rules, which are intended to fulfill statutory responsibilities assigned to the Commission under the Cable Communications Policy Act of 1984 (Cable Act),[4] are being modified in response to the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *American Civil Liberties Union v. FCC* (*ACLU*), [5] which remanded to the Commission, *inter alia*, the signal availability standard for further review. The revised rules are intended to satisfy the court's concerns while preserving Congress's original policy objectives in this area.

BACKGROUND

2. The Commission adopted the existing signal availability measures as part of the *Report and Order* [6] in this proceeding. The primary focus of the initial rule making was the implementation of Section 623 of the Cable Act, which required the Commission to identify the circumstances and conditions under which franchising authorities are to be permitted to regulate the rates charged by cable operators for "basic cable service." Section 623 expressly instructed the Commission to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." Neither the Cable Act nor its legislative history,[7] however, defined effective competition. Rather, the Commission was charged with defining this term as part of its rules implementing the Cable Act.[8]

3. In the *Report and Order*, the Commission determined that effective competition for cable system "basic service" would be deemed to exist where any three "off-the-air" broadcast signals were available in the cable community. The Commission ruled that a broadcast signal would be deemed "available" in either of the following circumstances: 1) the signal placed a predicted Grade B contour over any portion of the cable community;[9] or, 2) the signal was "significantly viewed," as measured by the traditional definition as specified in the rules.[10] The Commission also stated that parties disputing the accuracy of availability information based on these criteria would be permitted to submit showings and engineering studies indicating more precisely the availability of signals in the cable community. Thus, a franchising authority, for example, would be permitted to show that even though a broadcast signal met either the Grade B contour or significantly viewed test for availability, the signal was not actually available in the cable community.

4. In *ACLU*, the court concluded that the Commission's cable rate regulation rules are, for the most part, "neither arbitrary, capricious nor otherwise contrary to law." *ACLU* at 29. The court noted that the Cable Act grants the Commission broad discretion in constructing a definition of effective competition. The court also acknowledged that the Commission addressed the significant comments made in the rule making proceeding, considered the alternatives suggested by the commenters, and offered cogent reasons for adopting the basic standard it selected. *ACLU* at 28-30. However, the court found the standard for measuring signal availability in the effective competition test to be insufficiently justified and remanded that issue to the Commission for a reasoned explanation of the chosen standard or the development of a new standard. *ACLU* at 48.[11]

5. In response to the court's concerns, the Commission issued a *Further Notice of Proposed Rule Making* (*Further Notice)* seeking comment on proposed revisions to all aspects of the signal availability standard, including: 1) the availability measures currently employed; 2) the degree of coverage of the cable community necessary to establish signal availability under the Grade B contour standard; and, 3) the waiver standard.[12] Forty parties filed comments and seven parties filed replies in response to the *Further Notice*. A list of the commenting parties is provided in Appendix A.

DISCUSSION

Measures of Signal Availability

6. *Proposals*. In reviewing the predicted Grade B and significant viewing factors as measures of signal availability, the court noted that the Commission "properly considered ease of application . . . and that the standard chosen . . . bears a reasonable relationship to actual signal availability." *ACLU* at 46. The court did, however, remark on the imperfections in the chosen measures, pointing out as an example that, even if a particular residence might fall within the predicted Grade B contour of a broadcast station, a television set in that residence is not necessarily

able to receive the signal. *ACLU* at 45. The court also noted that there were potential difficulties with the "significantly viewed" portion of the signal availability standard. The court stated, however, that these imperfections are not invalidating in and of themselves given the absence of any completely error-free indicator of signal availability and did not mandate Commission adoption of another method. *ACLU* at 46. Rather the court stated: "use of the Grade B contour and 'significantly viewed' measure is not in itself problematic, much less arbitrary and capricious; the problem lies in the manner in which the Commission has incorporated these measures into its signal availability standard." *Id.*

7. In the *Further Notice*, we proposed to retain the Grade B contour and significant viewing standard as the basic measures of signal availability for determining effective competition in a cable community. We proposed to continue to measure the predicted Grade B signal contour as defined in Section 73.683 of the Commission's rules. However, we proposed to alter the basis upon which significant viewing is assessed for purposes of the cable rate regulation rules in accordance with the court's concern. Specifically, we proposed to assess significant viewing on the basis of viewership data in the cable community rather than the county. We indicated that such an approach would appear to reflect more accurately whether a signal was present in the cable community. We anticipated that this change would resolve many of the criticisms directed at the use of the significant viewing standard. However, we also recognized a community-based approach could require special studies and therefore be more costly and less convenient than a county-based approach under which data is readily obtainable from the nationwide county audience studies regularly prepared by one or more of the professional audience research firms.[13] We also stated that, as a possible alternative to avoid the expense and initial uncertainty of individual community audience surveys, we would consider continuing the use of county data as a *prima facie* standard of signal availability but with a less demanding rebuttal standard to be met by a contesting party.

8. In the *Further Notice* we also stated that we intended to continue to include translators for effective competition purposes in the same manner as provided under the current rules. In the *Report and Order*, the Commission had provided that translator stations which are authorized to serve the cable community but do not retransmit signals of stations already providing a Grade B contour or of stations significantly viewed within the cable community would also be included in the determination of signal availability.[14] The inclusion of these stations was not an issue in the court proceedings.

9. In addition, we noted in the *Further Notice* that the geographical area over which a given franchising authority has rate regulation authority does not necessarily coincide with the location of the cable *system* itself. We stated that this might result in cases where only specific units of a cable system would be rate regulated, *i. e.*, there might be cases where a cable system operating multiple community units would be rate regulated in one or more but not all of those units. We sought comment on the proper approach for addressing such situations.

10. *Comments*. In general, parties representing cable interests favor maintaining the current measures, while those representing the interests of franchising authorities support more restrictive measures. The National Cable Television Association (NCTA) and several other parties representing cable interests support our proposal to continue using the Grade B criteria for signal availability. They also support the continued use of significantly viewed signals determined on a county-wide basis as rebuttable *prima facie* indicators of whether a signal is significantly viewed within the cable community. The parties cite the ease with which the necessary audience data can be obtained and contend that it is only in exceptional cases that a signal that is significantly viewed in a county is wholly unavailable in one or more individual cable communities within the county. A group of cable television system operators and cable television associations filing joint comments (Joint Commenters), include a statement from Arbitron attesting that its County Coverage surveys give a general indication of viewership within a county. NCTA and the other cable parties also submit that parties should be permitted to rebut the *prima facie* indicators of significant viewing with viewership data from the area served by the cable system, using comparable sampling and measurement techniques.

11. The National League of Cities (NLC), representing the interests of many franchising authorities, states that the Grade B and significantly viewed measures should be replaced by a single 35-mile standard. NLC maintains such a standard would be readily applicable and simpler to administer than the measures we propose. It contends that if all sections of the cable community are within 35 miles of a broadcast station's transmission facilities, the signal should be presumed to serve that community. NLC opposes use of the Grade B contour on the grounds that this is only a theoretical measure of signal availability that suffers serious shortcomings in that it does not take site-specific factors into account and, furthermore, only indicates that a signal is available to 50 percent of the sites within its contours. NLC submits that the significantly viewed standard is even more flawed as an indicator of signal availability because the data are collected on a county-wide basis and, therefore, may not be representative of individual locations within a county. It argues that if the significantly viewed standard is retained, it should be used only to rebut a presumption of availability or unavailability. Many franchising authorities filed individual comments in this proceeding uniformly opposing the inclusion of significantly viewed signals as a *prima facie* measure of signal availability. However, they generally support continued use of the Grade B contour measure of availability.

12. The Massachusetts Community Antenna Television Commission (MCAT) opposes the use of the significant viewing measure on a community basis and submitted information attesting to the difficulty of obtaining community-specific viewing data. MCAT asserts that: 1) professional audience survey organizations do not maintain the viewing data needed for a reliable showing of community-specific unavailability of a significantly viewed signal, at least for small and medium-sized communities; 2) the requirement that non-cable households be used as an audience sample results in use of unreliable data; and 3) the purchase of viewing data on a community level is prohibitively expensive. MCAT explains that Arbitron, for example, retains its viewing sample for only a fifteen-month period. Thus, it submits that communities would have difficulty meeting the Commission's requirement that viewing data be submitted for two consecutive years before the Commission will consider altering a station's sig-

nificantly viewed status.[15] MCAT notes further that Nielsen Media Research estimates that the cost of a custom survey for proving a signal's status as significantly viewed in a community is at least48,000. It suggests that in order to meet the requirement for a two- year study, the cost would be double the Nielsen estimate. For these reasons, MCAT suggests that the Commission base a *prima facie* determination of effective competition solely on the availability of Grade B signals. MCAT argues that any community-specific viewing studies could be part of a waiver showing. MCAT also suggests that a signal should qualify as significantly viewed only if it has at least a 25 percent cumulative share of total weekly viewing hours and a net weekly circulation of 25 percent of total non-cabled households.

13. The City of Dubuque, Iowa (Dubuque) opposes continued use of the Grade B contour because, it asserts, the Grade B contour is an unreliable predictor of signal availability. Dubuque argues that the Grade B signal contour provides at best the predicted signal strength at only 50 percent of the locations 90 percent of the time within the contour. Thus, Dubuque asserts, even in those areas where the signal is actually present at the Grade B level, it will provide a viewable signal at only half the locations. It also points out that predicted contours do not take into account terrain blockage of the signal. Dubuque notes, for example, that even though its community is covered by the predicted Grade B contours of seven stations, because of terrain shielding, residents can actually receive only one local television station off-the-air. To overcome these problems, Dubuque recommends that the Commission use the Grade A contour measure.[16] It states that because the Grade A contour has a higher signal strength, it is more likely to facilitate reception and thereby general signal availability than the Grade B contour. Dubuque also argues that significantly viewed signals should not be included as a part of the standard. It states that the readily-available, county-wide data are inadequate indicators of signal availability in any specific cable community and that special studies are expensive, citing Nielsen estimates of55,000 to65,000 for a special study. TCI, in its reply comments, disagrees with the claims of Dubuque and MCAT that community-specific studies are expensive. TCI includes a "rate card" from Video Probe Index, Inc. indicating that this firm would charge between6,000 and10,000 for such a special viewing study. CATA states that firms such as Nielsen and Arbitron charge from4,000 to6,000 to conduct a special viewing study.

14. TCI submits that where a cable system serves multiple community units, effective competition should be deemed to exist with respect to all community units served by the physical system where either effective competition exists in a majority of the community units, or effective competition exists in communities which in the aggregate serve a majority of subscribers to the physical system. In its reply comments, the City of New York (NYC) opposes TCI's proposal. It states that such a rule would violate the Cable Act, which vests a franchising authority with the unrestricted right to regulate rates where the cable system it franchises is not subject to effective competition.

15. Palmer Communications Inc. (Palmer), which operates cable television systems in Florida and California, seeks clarification with respect to when translators are counted for effective competition purposes. Palmer asserts that substantial confusion exists with respect to translator's "location" or with respect to the community it is licensed to serve. It urges the Commission to declare that all stations, including translators, no matter where located, may qualify if its signal strength measurements meet the Commission's requirements for availability.

16. *Decision*. In choosing appropriate signal reception criteria to determine effective competition, we seek measures that will operate as reliable indicators of signal availability and that can be readily interpreted and applied by a franchising authority to the communities within its jurisdiction.[17] The choice is difficult because as the court stated, " *no* measure of signal availability is an error-free indicator of actual signal reception" (emphasis in original). *ACLU* at 46. Any of the available options for readily determinable measures may result in some cable systems being judged subject to effective competition when in fact, reception of three of more signals may not always be possible in the service area, and vice versa.[18] Yet we continue to believe that ease of application is an important criterion in our selection.

17. Upon review of the record submitted in response to the *Further Notice*, we are convinced that changes in the means of proving signal availability for purposes of the effective competition standard are warranted. We recognize that significant viewing as measured on a county basis may not always provide an accurate indication of signals actually viewable in individual cable communities within a county. As more fully explained below, therefore, we are modifying the basis for determining significant viewing, as it is used for purposes of the cable rate regulation rules,[19] to require the use of viewership data from the individual cable communities, rather than from the larger county area.

18. We are not persuaded that the Grade A contour or the 35-mile zone suggested by several parties are superior alternatives to the measures we have chosen. The Grade B contour and significant viewing measures provide theoretical predicted coverage and actual viewing indicators, respectively, of signal availability. The Grade B contour has long been employed by the Commission to define the expected range in which a broadcast television station's signal can be adequately received.[20] We also note that persons living in areas located in the outer reaches of the service areas of broadcast stations (for example, at the edge of a predicted Grade B contour) can, and generally do, take relatively simple measures such as installation of an improved roof-top antenna and careful location and orientation of that antenna to enhance their off-the-air reception. Thus, the predicted Grade B contour is more likely to approximate the area where a broadcast signal is, in fact, receivable. On the other hand, the higher level Grade A standard significantly underestimates signal coverage and, therefore, would be unacceptable as a standard for gauging signal availability. Similarly, while we have used a 35-mile zone for other purposes in other aspects of our regulations,[21] such a zone is far more rigid, and hence less accurate, than the Grade B contour as a predictor of the area in which a station can actually be received off-the-air.

19. The significant viewing concept is also an important component of our signal availability standard in that it can provide evidence that a station's signal is receivable in areas located beyond their predicted Grade B contour. In addition, significant viewing can indicate cases where viewers are willing to take special measures to receive signals in an area where Grade B signals are not available.

To exclude such signals from the determination of effective competition would ignore the marketplace evidence of their existence as effective competitors to basic cable service.[22]

20. As indicated above, we are modifying the basis upon which significant viewing determinations are to be made so that such determinations will henceforth more closely reflect community, rather than county-wide, viewing habits. We recognize that demonstrations of significant viewing relating to specific systems will, in most cases, be considerably more burdensome than those made using county data.[23] Nonetheless, we believe that the use of county data could lead to incorrect determinations as to effective competition and hence whether specific communities should or should not be engaged in the rate regulation process. Parties will not, of course, be obligated to make use of significant viewing statistics and those who can demonstrate that effective competition is present using only Grade B contours will have no need to procure a special audience study to determine significant viewing in their community.

21. Section 623 of the Cable Act provides that a franchising authority may regulate the basic service rates within its political jurisdiction if the cable system does not face effective competition. Effective competition decisions and the issue of whether rate regulation is permissible under the Cable Act are therefore matters to be addressed on a community-by-community basis. Indeed, the legislative history of the Cable Act specifically speaks in terms of determining on a "community-by-community basis" whether cable is subject to effective competition. We do not believe it inconsistent with this, however, to permit the kinds of system-wide viewing studies now authorized by the rules to be undertaken for use in effective competition determinations, with the results from such studies attributed without further subdivision to the various communities served by the system in all situations where this introduces no obvious bias into the surveying process. Indeed, on average, systems serve less than three political subdivisions (*TV Factbook* data for 1987 indicates that 7,836 systems served 21,579 communities). Thus, survey data applicable to the service area of systems obtained in a non-biased fashion from all areas served, should, in the typical situation provide a reasonable surrogate for viewing within discrete subdivisions in the absence of unusual terrain features.

22. While even greater decision making precision could be obtained by mandating in every case that the survey reflect only a particular system served political subdivision, this would increase the cost of the decision making process by increasing the number of separate surveys required several fold. As indicated above (note 23), special surveys involve a significant expense. While there undoubtedly would be some savings associated with simultaneously contracting for several surveys at the same time, additional controls to segregate out individual community data, while still complying with the requirements of Section 76.54(b), would beyond question increase the overall cost of the surveying process. Moreover, to alter the process now specified in the rules would not only obsolete surveys already completed but would add a third type of survey to the county and system-wide survey already authorized and would unnecessarily confuse the implementation and enforcement of not only the effective competition rules but also the other rules that rely on such survey data. By allowing studies using data obtained in compliance with Section 76.54(c) to be attributed to individual "community units" that make up a complete system we are vastly increasing the accuracy of the data over the county data previously provided for and generally used by the industries involved without introducing any systematic bias into it. Although this change by itself should greatly ameliorate the concerns expressed in note 38 of the *ACLU* decision, we also are amending Section 76.54(c) (see note 44 below) to provide that each franchising authority receive advance notice of any proposed viewing study. This will provide an opportunity for objection to the methodology of any study which, because of intervening terrain, large distances, unusual population distribution, or any other factors, is regarded as likely to distort the resulting audience data. While resolution of such objections creates some potential for additional litigation cost, as discussed above, use of system-wide data should generally accurately reflect community- specific data and therefore be acceptable to franchising authorities. Moreover, our experience with the use of system-wide data for other purposes suggests that parties generally, in the absence of some unusual features in the area, are prepared to recognize the validity of such data. Because some cooperation among local franchising authorities for parts of system operations is already a practical requirement of effective local regulation we have no reason to believe that pattern will not follow here as well. Accordingly, we do not believe there will be many instances in which the parties will not be able to agree on the appropriate data and will have to litigate the issue before us.

23. The requirements for a community-based study of significantly viewed signals will be the same as those currently provided in Section 76.54(b) and (c) of our rules.[24] We believe that a study using two one-week surveys, both of which may be done in the same year, as specified in Section 76.54(b), is adequate to provide sufficient information upon which to make a signal availability determination. This also will facilitate the determination of significantly viewed signals in a more timely manner.[25] We recognize that in areas of very high cable penetration, any off-the-air viewing is more likely to reflect islands of "good" reception than signal availability in the cable community as a whole. The results of viewing studies examining only the islands of good reception in such communities would be misleading. Thus, we will require that any viewing studies be based on a random sampling from the community.

24. To clarify our policy with respect to television translator signals, we will count an unduplicated signal provided by a television translator authorized to serve the cable community on an equal basis with full-power stations. We will presume that a translator is serving a community if the community lies wholly within the protected contour specified in Section 74.707 of the rules. Parties seeking to show actual signal availability of such translator service as part of the waiver showing must submit the same engineering study as required for a full-power station.

Required Degree of Signal Coverage

25. *Proposals.* As noted earlier, the court's fundamental objection to our signal availability standard was the manner in which the signal availability measures were incorporated into the standard (*i. e.*, a Grade B signal was to be counted if it were available *over any portion* of the cable community). In this regard, the court stated that

"[b]ecause the Commission knew it was dealing with the theoretical and appreciated the practical flaws inherent in its chosen measures, it was incumbent upon the FCC to craft the standard more carefully, to ensure that a signal is at least theoretically available over the entire cable community or at least some significant portion of the cable community." *ACLU* at 46-47. The court also faulted our failure to "discuss why the 'any portion' standard was selected over a more refined geographical qualification, such as 'a significant portion of the cable community,' or 'over 75 percent of the cable community.'" *ACLU* at 48. In light of this criticism, we stated in the *Further Notice* that it was appropriate to alter, in a manner consistent with the court's suggestions, the degree of community coverage a signal must provide to be counted for effective competition purposes.

26. With the court's statements in mind, we discussed several alternative proposals for resolving the signal coverage issue. One proposal was to include a signal only if it encompassed the entire geographic area of the cable community. We stated that while a population based coverage standard would appear to be more pertinent to the issues in question, such measurements would be difficult and expensive to obtain in contrast to the administrative ease of a geographical standard. We also stated that while a full encompassment approach could be applied in a straightforward manner, we questioned whether it might be overinclusive, resulting in local rate regulation of cable systems that were, in fact, subject to effective competition. Moreover, we expressed the belief that a cable operator would be unable to exercise market power anywhere in a cable community if only a relatively small portion of that community were not subject to effective competition. We observed that with a full encompassment measure, however, a local franchising authority would be entitled to rate regulate such a cable system. We, therefore, indicated that the most desirable approach appeared to be to consider that the effective competition standard would be met if at least 75 percent of the geographic area of the cable community had access to three or more broadcast television signals. We observed that while any coverage percentage we might ultimately choose was unlikely to be analytically precise, a 75 percent standard appeared to reflect a reasonable balance of the need to ensure that a broadcast signal counted as an effective competitor, in fact, covered enough of the community to provide competition to the cable system and of our desire to permit regulation of cable systems only where that is appropriate under the Cable Act.

27. *Comments*. The commenting parties offer a range of opinions on the degree of coverage issue. In general, parties representing cable interests favor limiting the required degree of coverage, while those representing the interests of franchising authorities support a more inclusive coverage requirement than that proposed in the *Further Notice*. NCTA and other cable parties support the concept that a broadcast signal must be available to at least some threshold proportion of the cable community if it is to have a competitive effect on the price of cable service. These parties also submit that the "any portion" feature in the existing standard can be justified on the basis that it is reasonable to assume that Grade B signals reaching any portion of a community are probably available for adequate viewing by most if not all residents in that community. The Joint Commenters submit an affidavit from Jules Cohen, consulting engineer, attesting that a television station's signal is present and receivable beyond its Grade B contour. This, NCTA and others argue, would provide the "reasoned explanation of its chosen standard" required by the court. Nonetheless, NCTA supports the Commission's 75 percent coverage proposal, stating that it is more than sufficient to indicate signal availability for purposes of effective competition.

28. NCTA also submits an economic analysis by Dr. Steven S. Wildman which concludes that an effective competition standard requiring that three signals be available to 75 percent of a cable community is sufficient to ensure that cable systems meeting this criterion generally have no incentive to raise their price above the competitive level. Wildman evaluated the profit-maximizing strategy for a cable system whose subscribers could be divided into two groups: consumers with competitive alternatives and those without. Using a range of likely subscriber demand conditions (*i. e.*, different estimates of demand elasticities as between the two groups of subscribers), he estimated the profitability of a price five percent above the competitive level.[26] Wildman found that if three quarters of the cable system's subscribers had competitive alternatives, a five percent price increase produced profits that were lower, in most instances, than profits at the competitive price. Thus, Wildman's study indicates that the 75 percent coverage requirement is, in most cases, sufficient to ensure that cable systems will not have an economic incentive to raise prices above the competitive level.

29. A second group of several cable system operators and cable associations (Cable Commenters) filing joint comments support retaining the "any portion" standard rather than shifting to the 75 percent coverage measure. They argue that it would be difficult to estimate accurately the coverage percentages from the Commission's contour maps because their scale is too small. Cable Commenters also point out that the scale of other readily available maps, such as those in the *Television and Cable Factbook* and the *Cable and Station Coverage Atlas* are even smaller. Thus, they argue that with this standard both franchising authorities and cable operators would be required to employ engineers to determine whether or not a given community is subject to effective competition.

30. NLC and the several cities filing separate comments recommend that the Commission adopt a 100 percent coverage standard. They argue that the 75 percent geographic coverage standard proposed in the *Further Notice* does not necessarily indicate 75 percent household coverage; that because a Grade B contour is only a theoretical indicator of signal availability, the 75 percent coverage standard does not mean that 75 percent of the geographic area is actually served by a broadcast station; and the 75 percent standard would create needless line drawing problems. NLC also described as erroneous the Commission's analysis that a cable operator will not be able to exercise market power even if a small portion of the cable community is not subject to effective competition.

31. *Decision*. In considering revisions to the Grade B coverage standard, we seek to address the court's concern that our measure of signal availability be at least theoretically available to the cable community and to do so in a manner that generally will permit regulation of cable systems only where that is appropriate under the Cable Act. We are particularly attentive to the position of the court and parties representing the interests of franchising authorities regarding the need to ensure that where a signal is determined to be available in a cable community

based on its predicted service area, the *prima facie* indicator of the accepted outer boundary of that area encompass the entire cable community or at least a substantial portion thereof. Consistent with the intent of Congress in adopting Section 623 of the Cable Act, we also believe it is important and necessary to tailor these revisions to provide for administrative ease of application.[27]

32. Upon consideration of the record and further reflection on the signal coverage issue, we have decided to adopt a full encompassment standard rather than the 75 percent coverage approach we proposed in the *Notice*.[28] Under the approach we are adopting, it is not necessary for the same three signals to cover the entire area of the cable community. Rather, the effective competition test will be met if multiple signals, some or all of which may provide Grade B service to less than 100 percent of the community, overlap such that all areas of the community are within the Grade B contours of the necessary number of signals.[29] This approach will satisfy the court's implied concern that we employ a relatively conservative standard for determining signal availability in view of the predictive, or theoretical, nature of the Grade B coverage measure. The approach we have chosen will also facilitate inexpensive, easy to obtain determinations as to whether the standard is satisfied in cases where three or more signals each fully encompass the cable community.[30] The new standard will assure that off-the-air signals are, in fact, generally available in communities which are found to have effective competition.[31] Effective competition determinations in cases where the same signals do not fully encompass the community are, of course, likely to be somewhat more complex. However, even in these cases, once the coverage contours have been plotted on a map of suitable scale, it will be possible to readily ascertain whether any area is not covered by the necessary number of Grade B signals.

33. We are rejecting our initial proposal to adopt a 75 percent coverage standard out of concern for the difficulties in determining the portion of the geographic area covered by a broadcast signal's Grade B contour and the fact that the portion of the community's population residing within the area covered by a Grade B signal may vary significantly from the portion of the community the area represents on a geographic basis. The full encompassment standard resolves both of these problems. We recognize that the full encompassment approach is more inclusive in terms of the number of cable systems that will be subject to local rate regulation than the 75 percent approach and also continue to believe that a cable operator would not be able to exercise market power if only 25 percent of the community were not subject to effective competition. However, in view of the court's admonishment concerning the theoretical nature of the Grade B measure, we find it appropriate to use a more conservative standard. In this respect, the full encompassment approach will provide added assurance that signals that meet the *prima facie* standard of signal availability are receivable throughout the cable community and thus we conclude that it constitutes an acceptable degree of regulation under our revised view of this issue. To make the basic test turn on coverage of community subsections, would invite disputatious controversies over matters of line drawing finer than the precision of the basic regulatory tools that are available to us to measure signal accessibility.

Waiver Procedure

34. *Proposals*. In the *Report and Order*, the Commission established a procedure whereby parties could show that the Grade B contour test did not accurately reflect actual signal availability in their community. It stated that:

> in order to ensure that franchise authorities are permitted to rate regulate in those areas where there is not effective competition, franchise authorities may submit showings and engineering studies to indicate that such signals are in fact not available anywhere within the cable community. Such studies shall include field strength measurements made in accordance with Section 73.686 of the Commission's rules." *Report and Order* at para. 107.

The court, in reviewing the waiver procedure, noted "with concern the substantial barrier the current waiver system may place on franchising authorities. . .[and that] this is an area the Commission would be well-advised to deem fruitful for further study on remand." *ACLU* at 47. The court also expressed concern that the engineering studies necessary to demonstrate the absence of signals may be unreasonably expensive for franchising authorities to provide.

35. We proposed several alternative methods for performing field strength measurements that are less expensive and, while not necessarily meeting the stringent standards prescribed by §73.686(c), nonetheless would still provide adequate information for determining field strengths for purposes of the cable rate regulation rules.[32] First, we proposed to permit cluster measurements[33] to be used in place of the mobile runs for measuring signal strength required under §73.686(c)(2)(iii). Second, we proposed to allow the use of an antenna mounted at a height lower than the 30 foot level required by §73.686(c)(2), with compensating decreases in the observed signal strength levels. And third, we proposed to reduce the number of grid locations that must be measured in a signal strength study from that required by §73.686(c)(1)(ii) our rules.[34] We proposed, as a point of departure, to specify that a signal must have a Grade B or better signal strength at 75 percent of the measured locations to be counted as available in the community. We sought comment with respect to the extent it might be possible to significantly reduce the costs of field strength measurements by these approaches and to what extent their use would adversely affect the validity of the results.

36. We also indicated that we intended to consider the use of other readily observable factors that would indicate signal availability in a community as a means for assigning the burden to the parties in a waiver case. We specifically discussed the level of cable penetration in the community as one such factor. We observed that high cable penetration in a particular community is often thought to be a reliable indicator of broadcast signal reception problems. We noted that the cable penetration rate was considered and rejected as a *prima facie* indicator of signal availability in the *Report and Order* because high penetration may reflect superior service or low rates, rather than the absence of competitive alternatives.[35] However, we questioned whether this measure might be satisfactory as a means for assigning responsibility for the burden of proof in the waiver procedure. In this regard, we indicated that cable penetration in the range of 80 to 85 percent might

be an appropriate trigger for shifting the burden of proof from the franchising authority to the cable system operator.

37. *Special Studies: Comments.* The commenting parties generally agree that the existing waiver procedure is too burdensome, and they support our efforts to reduce the cost of the special studies part of the waiver process. The commenting parties also offer additional suggestions for further simplifying the process. The NCTA and others representing cable interests argue that parties should continue to be permitted to rebut predicted Grade B contours with actual field strength measurements. NCTA submits that use of a less expensive method of measuring actual field strength to rebut the predicted Grade B contour should be allowed only if that method were still unquestionably more reliable than the predicted Grade B contour. It states that our proposal to permit cluster measurements satisfies this basic requirement. However, NCTA states that the proposal to permit measurements to be taken at lower antenna heights presents too great a risk of inaccuracy and unreliability. NCTA argues that where terrain factors such as trees or buildings interfere with the line of sight between transmitting and receiving antennas, the correction factor will vary substantially across individual locations and there is no readily applicable means for determining the proper factor for each location. The Community Antenna Television Association (CATA) states that reducing the number of grid measurements would not significantly reduce costs because most of the expenses involved in these studies are the fixed costs associated with assembling the crews and equipment. The Joint Commenters suggest that the engineering process can be simplified by: 1) accepting spot measurements made at the community boundaries farthest from the television station; 2) accepting measurements made along a single radial through the community, in line with the station; and, 3) providing for use of a larger number of measurements if needed.

38. NLC urges the Commission to adopt a simplified waiver procedure. NLC states that the Commission's proposals to reduce the costs of engineering studies under the existing standards represent no more than fine tuning and that the burden of conducting these tests would fall disproportionately on franchising authorities. NYC states that as an alternative to the expensive engineering studies, the Commission should allow the use of consumer rating surveys correlated to the six graded signal standards established by the Television Allocation Study Organization (TASO). NYC also submits that, in the event the Commission decides to continue to require engineering studies, it would support cluster measurements and lowering the antenna height requirement to seven and one-half feet.

39. Dubuque supports our proposals to reduce the costs of engineering studies, which it estimates to be25,000, by permitting the use of cluster measurements and reduced antenna heights. However, it states that these changes would relieve only a small part of the burden of the waiver process from franchising authorities. Dubuque suggests additional alternatives such as allowing meter readings to be taken at the antenna input of television receivers connected to a suitable outside antenna, allowing a study to be based on the pictures observed from television sets located in various parts of the community, or the use of a survey of residents who utilize an outside antenna for off-the-air reception. Finally, Dubuque states that the existing waiver procedure may require that a party seeking a waiver submit both an engineering study and a special viewing study. Dubuque urges the Commission to clarify its policy to make clear that it will require only one study for a waiver, *i. e.*, it seeks to have us specify that the party seeking a waiver is required to submit one study with its waiver application.

40. *Special Studies : Decision.* In considering ways to reduce the burden of studies demonstrating signal availability, we are guided by the principle that the satisfactory performance of the waiver process requires that demonstrations of signal availability provide significantly more accurate assessments than the *prima facie* Grade B contour standard. In this respect, it is necessary that acceptable studies be conducted in a professional, scientific manner using a methodology that can reasonably be expected to measure the physical presence of a signal of Grade B or better quality and to yield similar results if replicated by another party. With these considerations in mind, we are making certain changes in the requirements for engineering studies.

41. Under the revised standards applicable to engineering studies, we will permit field strength measurements to be made on a cluster basis, but will no longer require mobile runs.[36] The record confirms our initial conclusion in the *Further Notice* that use of cluster measurements taken from fixed positions will provide some reduction in the costs of engineering studies and will still provide high quality information to determine signal field strength coverage. However, we are not adopting either of our other two proposals for modifying the field strength measurement procedure. We conclude that to permit the use of lower antenna heights could substantially compromise the validity of the test results. As commenting parties observe, at levels below the 30 foot height, signals are subject to additional shadowing by terrain, trees, and structures that make it extremely difficult to specify a lower antenna height with proper compensating adjustments to the signal strength level. We also find that reducing the number of sample points could seriously reduce the validity of a study as a description of the signal strength received over the entire community. Moreover, as CATA comments, the number of grid measurements does not appear to be a significant element in the cost of a field study.

42. We do not find it appropriate or desirable to allow the use of any of the suggestions submitted by several parties for simplified alternate engineering study methods as substitutes for the modified field strength measurement procedures described above. While these methods would appear to offer some advantages in terms of cost savings, they would not meet the necessary criterion of providing a significantly better assessment of signal availability than the *prima facie* measure. In this respect, both the spot measurement at the farthest community boundary and the measurements on a radial that were suggested by CATA would only examine the signal strength in a very small portion of the community. The propagation characteristics of television signals are such that simple measures will not generally provide a reliable indication of signal strength over the entire community. It is precisely for these reasons that we maintain the grid measurements approach set forth is Section 73.686. Methods such as the consumer ratings approach suggested by NLC and the measurement of signals provided by consumers' outdoor antenna approach suggested by Dubuque involve a significantly greater degree of subjective judgment and are less scientifically verifiable than the criteria we utilize in Section 73.686.

Such showings by their very nature would inevitably be contested before the Commission, thereby resulting in delays of the waiver process and additional expenses for both the parties and the Commission.

43. We conclude that the percent of coverage standard applicable to the use of field strength measurements for determining whether a signal should be counted as an effective competitor should parallel the standard used for signals that qualify as effective competitors on the basis of predicted Grade B contour predictions. If all of the signal availability determinations in a community are made on the basis of field strength measurements, this will mean that three or more signals must provide actual Grade B or better service to at least 50 percent of the locations measured. For effective competition to be deemed to be present where signal availability determinations are made on the basis of predicted Grade B contours for some signals and actual field strength measurements for others, 50 percent of the locations measured for signals must receive actual Grade B service or better within an area coincident with an area equal to the entire community that is served by the predicted Grade B signals.

44. As a final matter relating to the need for special coverage studies, we point out that we are continuing efforts to develop proposals for revising the Commission's predicted Grade B contour rules so that they can better accommodate terrain factors.[37] While such revisions of our predicted Grade B contour definition will be of no assistance to parties seeking immediate resolution of signal availability and effective competition issues, some problems associated with unusual terrain may be addressed through refined prediction methodologies in the future.

45. With respect to Dubuque's concern regarding the need to submit more than one study as part of the waiver process, we observe that under the revised rules, franchising authorities generally will not find it necessary to conduct audience surveys relating to significant viewing. Assuming a given signal qualifies to be counted on the basis of either predicted or measured Grade B coverage, a finding that such a signal is not significantly viewed in a community will not disqualify it from counting toward meeting the effective competition standard. Also, as significant viewing determinations will now require community data, it is not expected to be necessary for franchising authorities to conduct special studies of their own to refute the significant viewing evidence offered by cable systems. That is, an acceptable audience study submitted by a cable system will have been prepared by an independent professional research firm and thus we would not normally expect the franchising authority to have cause to challenge its results. Thus, we expect the waiver requests submitted by franchising authorities will focus on field strength measurement studies.

46. *Burden : Comments.* Commenting parties representing cable interests are uniformly opposed to the use of high cable penetration as an indicator of possible broadcast signal reception problems. NCTA and the other cable interests state that our proposal to use cable system penetration as an additional indicator of signal availability for purposes of effective competition is wholly inappropriate and should be rejected. NCTA cites the rationale adopted in the *Report and Order* wherein the Commission rejected cable penetration as a reliable indicator of broadcast reception problems. NCTA argues that cable penetration should not preempt or supersede the predicted Grade B contour as a *prima facie*, presumptive indicator that a Grade B signal is present in the community.

47. Those parties representing the interests of franchising authorities generally support this burden shifting mechanism but are in favor of a lower threshold penetration level. The NLC also proposes an alternative waiver mechanism. It recommends that the cable operator be permitted to rebut the presumption that the cable system is not subject to effective competition by making a showing that it is not earning a monopolistic rate of return. To this end, NLC argues, the Commission should establish uniform accounting procedures and standards and a maximum allowable rate of return. NLC also submits that the Commission should establish a similar process under which a franchising authority could rebut the presumption that a local market is competitive by showing that the cable operator's rates are excessive. NLC suggests that the Commission define a zone of reasonableness, such as within 20 percent of the average rate charged by systems with comparable channel capacity.[38]

48. *Burden : Decision.* As the court observed, the current waiver process almost always places the responsibility for engineering studies of broadcast signal availability on franchising authorities. In view of the high cost of these engineering studies, we continue to believe it is desirable and appropriate to establish a scheme that will more fairly assign the responsibility for such showings in waiver cases.[39] Our objective in this regard is assign the burden in a manner that both is simple to apply and equitable.

49. Upon consideration of the record and further reflection on this issue, and, in particular, in response to concerns raised by NCTA and other cable interests, we find that cable penetration is not a satisfactory measure for assigning the burden of proof in cable rate regulation waiver cases. While the cable penetration approach would be relatively easy to administer, assuming penetration data could be accurately collected, it would not provide consistent, reliable indications as to which party would be likely to prevail in waiver cases. In this respect, we conclude that the shortcomings that led the Commission to reject cable penetration as an indicator of effective competition in the *Report and Order* are of a sufficiently serious nature as also to make it unsatisfactory for use in assigning burden.[40] Here, we are particularly concerned that the cable penetration approach could penalize cable operators who achieve high subscribership levels through quality service, low prices, and/or high local demand for cable service. In cases where a cable system was close to the burden shifting level of penetration, a penetration standard might operate as a disincentive to improve service or pricing policies.

50. In light of our earlier conclusion on the use of penetration data, and in response to the cable industry's concerns regarding the use of such data, as well as the difficulty of establishing a reasonable penetration benchmark, we have determined that the best approach is one that directly addresses the court's emphasis on the financial burden imposed on cities by the engineering showing required in waiver cases. *ACLU, supra* at 1573, n. 37. The specific issue addressed by the court involved the situation where a signal is predicted to be present but local regulatory authorities have cause to believe that a more precise engineering study will reveal that it is not. Under the approach we are adopting, the party who loses a waiver proceeding will be required to pay the cost of the en-

gineering study undertaken in accordance with the provisions of Section 73.686 that proves (or seeks to prove) the absence of effective competition. The process will work as follows. The franchising authority wishing to undertake such an engineering study shall provide formal notice thereof to the system operator and provide it with an opportunity to negotiate a resolution of the matter which might include, for example, joint or informal studies that both parties would agree to be bound by. If the matter cannot be resolved informally, the system operator shall be informed of the identity of the firm that will perform the study, the general methodology and timing of the study, and the cost thereof. The system operator shall state in writing in response thereto any objections, including any technical or procedural objections that it may have. The franchising authority shall in good faith attempt to correct any deficiencies identified but notwithstanding any such objections the study may proceed and the results, if supportive of the franchising authority's claim, may be presented to the Commission in accordance with the provisions of Section 76.7 of the rules.[41] If the Commission's decision is adverse to the franchising authority, it shall be responsible for the full cost of the engineering study. If the result is adverse to the cable system operator, it shall promptly reimburse the franchising authority for the cost of the engineering study relied upon.

51. This approach not only will assign the burden in a fair manner, but also will create a system of incentives for cable operators and franchising authorities that will minimize the number of unwarranted waiver cases that are actually brought before the Commission. In this respect, parties on both sides will have a incentive to carefully evaluate their likelihood of success in the waiver case before an engineering study is undertaken. For example, if it were apparent from knowledge obtained by less formal means, such as familiarity with local reception conditions or spot measurements of signal strengths, that signals would not be found available in a community by a formal engineering study conducted in accordance with our rules, the cable operator would have strong incentive to yield to regulation. In such cases, the cost of a study would not be a deterrent to the franchising authority in pursuing a waiver. Similarly, if it were likely that a study would find that signals were in fact available in the community, the franchising authority would be taking a major risk in contracting for the study. We believe that conditioning cable system exemption from local basic cable service rate regulation on system operators accepting responsibility for the costs of engineering studies in the circumstance described above not only creates the proper incentives and allocations of burdens from an equitable and administrative point of view but is within the mandate of Section 623 of the Cable Act which in broad terms assigns the Commission authority "to define the circumstances in which a cable system is subject to effective competition."

Broadening the Proceeding

52. Several parties suggest that we broaden the instant proceeding so that we may reconsider the three-signal standard in its entirety. The NLC and INTV, for example, state that this proceeding represents an opportunity for the Commission to assess the impact of its 1985 decision and revise its standards. In its reply comments, the NCTA argues that reconsideration of the three-signal standard of effective competition is outside the scope of this proceeding and is unwarranted. TCI also opposes broadening the proceeding at this time. It notes that the three signal standard was upheld by *ACLU* and that since the new rules have only been in effect for one year it is far too soon to consider changing them at this time.[42]

53. We agree with NCTA and TCI that reconsideration of the three-signal standard of effective competition at this time is beyond the scope of this proceeding. The decision in *ACLU* upheld the three-signal standard and this proceeding is intended only to respond to the specific concerns expressed by the court therein with respect to the measures of signal availability and the waiver process. Furthermore, we believe that it would be inappropriate to reexamine our effective competition standard at this time. While the Cable Act has been in effect since 1984, the Commission's cable rate regulation rules became effective only in 1987. Thus, insufficient time has passed to enable us to accurately assess the impact of the new regulatory environment. We further observe that the Cable Act anticipates and in fact requires Commission review of the effectiveness of its rules by requiring submission by the FCC of a Report to Congress and that the proceeding that will be conducted in that regard is the most appropriate occasion to revisit the effective competition standard.[43]

Implementation of the Rules

54. Under the modified rules, the Grade B prong of the *prima facie* signal availability standard can, in most instances, be determined more readily than the number of significantly viewed signals, which may require that special audience studies be performed.[44] In addition, some parties may need to perform special engineering studies in connection with the waiver process. In order to allow time for preparation of any such special studies, (and for completion of review under the Paperwork Reduction Act of 1980), we will delay full implementation of the new rules for a period of six months from the release date of this *Second Report and Order*.[45] In order to avoid disruptive situations in cases where a cable system has been subject to rate regulation under our prior rules, the new rules will provide that such systems will remain subject to that regulation pending demonstration that they may not be regulated pursuant to the revised standards.

SUMMARY

55. To summarize the actions taken herein, the rules, as revised, amend the signal availability standard currently embodied in the cable rate regulation rules. Under these rules, a cable system will be considered to be subject to effective competition, and therefore exempted from local rate regulation, if three or more, not necessarily the same, broadcast television signals are available to the entire geographical area of the cable community. The *prima facie* standard of signal availability will be determined on the basis of predicted Grade B contours as defined in Section 73.683 of the rules, and significant viewing in the cable community as defined by Section 76.5(k) and 76.54(b) and (c) of the rules. Parties seeking a waiver of the Grade B *prima facie* standard of signal availability should submit an engineering study showing actual signal availability as provided for in Section 73.686 of the rules (except that cluster measurements may be substituted for the mobile run requirement). If interference is an issue, the submission should also include field strength measurements of all pertinent interfering signals, *i. e.*, co- channel, adjacent channel or taboo channel (UHF). Furthermore, respon-

sibility for the cost of engineering studies to refute the predicted availability of Grade B service will fall on the party that loses in the waiver proceeding. The party intending to obtain a study must first inform the other party and provide it an opportunity to negotiate a resolution. Parties not taking this first step will be assigned full responsibility for the study costs. These new rules will become effective six months after the release of the *Second Report and Order*.

PROCEDURAL MATTERS

56. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. ***Need for and purpose of the rules.*** The rules adopted herein are in accordance with the requirements of the decision in *ACLU* that remanded a portion of the Commission's decision in the *Report and Order* implementing the Cable Act. The court remanded the signal availability standard to us for further explanation or development of a new standard.

II. ***Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.***

A. *Issues Raised.* In the *Further Notice*, the Commission stated that it was unable to estimate the number of cable systems that would be affected by the proposed modifications to the rules. Parties commenting in this proceeding provided no information on this issue. Commenting parties suggested several ways the burden of the rules could be mitigated for those cable systems and franchising authorities to which the rules applied.

B. *Assessment.* While we were not able to estimate the number of cable systems to be affected by these rule changes, we have reduced as much as is possible consistent with our policy objectives and the instructions of the court, the burdens on franchising authorities and cable systems directly affected by these rules.

C. *Changes made as a result of comments.* The change in the signal coverage requirement will decrease the burden on franchising authorities of determining whether a cable system faces effective competition. In addition, the provision that the losing party in a waiver proceeding is now required to pay for any engineering studies obtained pursuant to that proceeding will reduce further the burden the waiver process imposes on franchising authorities.

III. ***Significant alternatives considered and rejected.*** Several parties suggested alternatives to the engineering and audience survey evidentiary requirements of the waiver showing. These alternatives were rejected because the proposed variants to the present requirements adversely affected the validity of the results.

57. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

58. The Secretary shall cause a copy of this *Second Report and Order*, including the Final Regulatory Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603 (a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§601 *et seq.*, (1981).

59. Accordingly, IT IS ORDERED THAT under the authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, Part 76 of the Commission's rules and regulations IS AMENDED as set forth in the attached Appendix A. These rules and regulations ARE EFFECTIVE June 2, 1988.

60. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. Section 76.33 is amended to read as follows:

§76.33 Standards for rate regulation.

(a) Effective October 29, 1988, a franchising authority may regulate the rates of a cable system subject to the following conditions (cable systems that were subject to rate regulation prior to this date will remain subject to that regulation pending demonstration that they may not be regulated pursuant to this section):

(1) Only basic cable service as defined in §76.5(ii) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives service from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in §73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in Section 76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in Section 74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community. (3) The Commission may grant waivers of this standard where the filing party demonstrates with engineering studies in accordance with §73.686 of the Commission's rules or by other showings that such Grade B level signals are (or are not) in fact available within the community. In performing the en-

gineering studies noted above, cluster measurements, as provided in §73.686(b)(2)(viii), may be taken in place of mobile runs as provided in §73.686(b)(2)(v)). Responsibility for the cost of engineering studies undertaken to refute the predicted availability of Grade B service will fall on the party that loses in the waiver proceeding. Any party intending to obtain this study must first inform the other party and provide it an opportunity to negotiate a resolution. Parties not taking this first step will be assigned full responsibility for the study costs. (4) A cable system, once determined to be subject to effective competition after the effective date of this section, shall not be subject to regulation for one year after any change in market conditions which would cause it to be determined not to be subject to effective competition. (b) In establishing any rate for the provision of basic cable service by cable systems subject to paragraph (a) of this section, the franchising authority shall: (1) give formal notice to the public; (2) provide an opportunity for interested parties to make their views known, at least through written submissions; and, (3) make a formal statement (including summary explanation) when a decision on a rate matter is made. (c) Any party may petition the Commission for relief of the provisions in this section in accordance with the provisions and procedures set forth in §76.7 for petitions for special relief.

2. Section 76.54, paragraph (c) is amended to read as follows:

§76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least thirty (30) days prior to the initial survey period. Furthermore, if a survey is undertaken pursuant to the provisions of Section 76.33(a)(2) of the rules, notice shall also be served on the franchising authority. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

* * * * *

APPENDIX B

Parties Filing Comments

1. Association of Independent Television Stations, Inc.
2. Astoria, Oregon
3. Boston, Mass.
4. CATV Service, Inc.
5. Cable Television Advisory Committee, Williamstown, Mass.
6. Citizens Cable Committee of Clearfield, PA
7. Cole, Raywid & Braverman on behalf of several cable television system operators and state cable television associations
8. Community Antenna Television Association
9. Congressman DeFazio on behalf of constituents, Oregon
10. Dalles, Oregon
11. Dubuque, Iowa
12. Durango, CO
13. Fayetteville, Arkansas
14. Fergus Falls, Minn.
15. Fleischman and Walsh, P.C. on behalf of several parties including cable television systems owners and operators and cable television associations
16. Fort Stockton, Texas
17. Germantown, Tenn.
18. Hermiston, Oregon
19. State if Hawaii
20. Howard E. Horton
21. Kerrville, Texas
22. Massachusetts Community Antenna Television Commission
23. Metropolitan Cablevision, Inc.
24. Motion Picture Association of America
25. Munising, Michigan
26. National Cable Television Association, Inc.
27. National League of Cities
28. Nederland, Colorado
29. New York, N.Y.
30. Newport, Oregon
31. North Carolina CATV Association
32. Palmer Communications Inc.
33. Pendleton, Oregon
34. Plainview Police Dept., Plainview, Minn.
35. Ramsey/Washington Counties Surburban Cable Communications Comm., Minn.
36. Rochester, Minn.
37. Slidell City Council, La.
38. Springfield, Mass.
39. Tele-Communications, Inc.
40. State of West Virginia

Parties Filing Reply Comments

1. Community Antenna Television Association
2. Dubuque, Iowa
3. National Cable Television Association, Inc.
4. New York, N.Y.
5. North Carolina CATV Association
6. Palmer Communications Inc.
7. Tele-Communications, Inc.

FOOTNOTES

[1] 47 CFR §76.33(a)(2).

[2] Basic cable service is defined as any service tier which includes the retransmission of local broadcast television signals. This definition, which specifies local signals in terms of the qualifications for cable must carry status under the rules in effect prior to July 19, 1985, is set forth in Section 76.5(ii) of the rules. *See* 47 CFR §76.5(ii).

[3] This decision does not alter our basic policy position that a cable system is subject to effective competition, and therefore exempted from local rate regulation, if three or more broadcast television signals are available in the cable community.

[4] Pub.L. No. 98-549, Stat. 2779 (1984) (Codified at 47 U.S.C. §§521-559 (Supp. II 1984)).

[5] 823 F. 2d 1554 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3644 (March 22, 1988).

[6] *See Report and Order* in MM Docket No. 84-1296, adopted April 11, 1985, 50 FR 18637 (1985) (hereinafter *Report and Order*). *See also Memorandum Opinion and Order* in MM Docket No. 84-1296, adopted May 30, 1986, 51 FR 21770 (1986).

[7] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984).

[8] *See* 47 U.S.C. §543(b)(2)(A).

[9] The use of the term "cable community" is intended in this context to mean "cable community unit" which refers to a cable television system, or portion of a cable television system, that operates within the jurisdiction of a separate and distinct community or political subdivision. *See* Section 76.5(ff) of the rules. 47 CFR §76.5 (ff) We recognize that cable systems generally are franchised by political subdivisions, but operate from headends that may cover more than one political jurisdiction.

[10] The Commission's current approach to determining significant viewing generally relies upon audience statistics that are collected on a county-wide basis. To obtain significantly viewed status, a network station must achieve a cumulative share of weekly viewing hours of at least 3 percent, and a net weekly circulation of at least 25 percent; and an independent station must achieve a cumulative share of weekly viewing hours of at least 2 percent, and a net weekly circulation of at least 5 percent. *See* Sections 76.5(k) and 76.54 of the Commission's rules. 47 CFR §76.5(k) and 47 CFR §76.54. It should be noted that significant viewing, whether measured on a county or community basis is not intended to be a measure that has an immediate correspondence to the alternative Grade B measure of signal availability. As a test of availability it has the advantage of reflecting actual residential reception rather than a predicted signal level. It, however, has the disadvantage of reflecting consumer preferences among signals rather than receivability *per se* and is in this sense only a subset of available signals. The greater the number of signals that are technically available, the smaller will be the audience level of each individual signal. Together, the "net weekly circulation" and "share" components of the standard are intended to provide assurance of the regular availability of the signals involved but do not correspond directly with the "Grade B" measure either on a statistical or on an engineering (signal strength) basis.

[11] The court also reversed our rules in three other specific areas: 1) the definition of "basic cable service"; 2) the automatic pass through to subscriber rates of increases in certain costs; and, 3) the lock box requirement. In accordance with the court's instructions, we amended these rules in a separate action. *See Memorandum Opinion and Order*, in MM Docket No. 84-1296, adopted September 17, 1987, 2 FCC Rcd 5893, 52 FR 37461 (October 7, 1987).

[12] *See Further Notice of Proposed Rule Making*, MM Docket No. 84-1296, adopted September 17, 1987, 2 FCC Rcd 5888, 52 FR 36802 (October 1, 1987).

[13] Arbitron and Nielsen Media Research, for example, collect and publish estimates of off-the-air viewing of broadcast television stations for every county in the continental United States, except for those where there are problems with obtaining a statistically reliable sample of viewing households. *See e. g., County Coverage Surveys, Cable - Controlled.*

[14] *See* Section 76.33(a)(2) of the rules. 47 CFR §76.33(a)(2).

[15] *See KCST - TV, Inc.*, 59 RR 2d 1270 (1986).

[16] The Grade A contour is defined in Section 73.683, 47 CFR §73.683.

[17] *See Report and Order, supra*, at paragraph 19.

[18] *See also id.*, at paragraph 106.

[19] This action does not affect or alter in any way the traditional method of assessing significant viewing as specified in Section 76.54 of our rules or the use of significant viewing as defined thereunder in other sections of our rules.

[20] For purposes of administering our national plan for the allotment of television channels, a statistical approach is used for evaluating signal field strength. In authorizing television stations, three statistical field strength indicators are used:

1) Principal City Grade (city area, adequate reception expected at 90 percent of the locations 90 percent of the time);

2) Grade A (urban area, adequate reception expected at 70 percent of the locations 90 percent of the time); and,

3) Grade B (rural area, adequate reception expected at 50 percent of the locations 90 percent of the time).

These contours are usually represented as a continuous geographical line encompassing a particular area on a map and are determined from calculations of locations at radial distances from the transmitter that are based on a series of technical factors. These are the measures we generally use to depict the protected coverage area of television stations. Sections 73.683 and 73.685(a), 47 CFR §73.683 and §73.685(a). The variations due to location in these definitions refer to those variations which occur within a small area, *e. g.*, within a 100 foot by 100 foot area. *Under standard conditions* most properties larger than this on the Grade B contour should have one or more specific sites at which a satisfactory picture can be received.

[21] Indeed, the 35-mile zones that are used in the rules are not intended to reflect the service areas of stations.

[22] A television station's usable signal does not end abruptly at its predicted Grade B contour. Reception at a significant distance beyond the contour is possible for a variety of reasons including, for example, the presence of terrain more favorable to signal propagation than that assumed in the prediction rules, the use by consumers of higher gain antennas, lower loss transmission lines, receivers with a lower noise figure (increasingly likely with recently produced receivers), higher antenna locations, or a willingness to accept as usable signals of a lesser quality. The Commission recognized, in initially adopting the significant viewing test that "it is not uncommon for stations to have audiences beyond their Grade B contours. . ." (*Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, at para. 58 (1972)) and has used the viewing test in the ensuing years as a means of reflecting that fact. Congress subsequently incorporated the significant viewing test into the copyright law by reference as a measure of a signal being considered to be local for copyright

purposes. 17 U.S.C. §111 The extent of such reception can be easily seen by comparing readily available over-the-air reception data *(Arbitron's County Coverage Surveys, Cable Controlled* (after accounting for translator operations) with standard contour reception maps (*e. g., Television and Cable Factbook, Stations Volume* or *Cable and Station Coverage Atlas)*).

[23] Many parties claim that the audience studies required by the significant viewing part of the signal availability standard involve substantial expense. The additional expense involved is concomitant to and must be viewed in relation to the additional accuracy that the court's decision appears to require. As noted by several commenting parties, such studies can, in many cases, be obtained for under10,000. We also note that the major audience research firms already have available, in unpublished form, audience "diary" surveys for all the counties in the continental United States and that in many cases there are enough diaries in the county surveys to provide a statistically sufficient number of diaries for samples for major communities within counties. (*See e. g., Arbitron's County Coverage Surveys, Cable - Controlled)* These research data are directly applicable to the requirements of the signal availability standard and may be purchased at substantially lower cost than a custom audience survey. There are, of course, many communities where there are insufficient diaries available from the regularly conducted surveys to support a community based significant viewing study. In such cases, the cable operator or franchising authority would have to independently choose whether to undertake the investment in a special study. We would not read the advance notice provisions of Section 76.54(c) (advance notice of survey methodology to other interested parties) as precluding use of data already collected based on methodologies previously approved by the Commission. In such cases notice to other interested parties prior to purchase of data would suffice.

[24] We note that Section 76.54(b) permits a community-based viewership survey, taken on the basis of the entire cable system, to be applicable for each cable community unit within the system.

[25] In this regard, several parties sought clarification with respect to whether the Comission would apply the standard developed in *KCST - TV, Inc.*, 59 RR 2d 1270 (1986), herein. This standard was developed in response to a television station's request for waiver of the network program nonduplication rule (Section 76.92(g)) based on evidence that a particular station was no longer significantly viewed in a particular county. In *KCST*, the Commission stated that parties making such a showing must provide evidence that the station in question has not met the viewing standard for two consecutive years. Regulatory authorities expressed concerns in comments filed in this proceeding that following the *KCST* process would make it difficult to rebut county data. Those concerns are largely answered by the change made herein to more specific community survey requirements. Once community-specific viewing has been established, however, we believe it is appropriate to follow the *KCST* process before deleting those signals as being significantly viewed once again. The considerations here appear to parallel closely those set forth in the *KCST* decision.

[26] Wildman's study assumed that the 75 percent geographical coverage is equivalent to 75 percent population coverage, and that the cable operator does not price discriminate between those subscribers who face effective competition and those subscribers who do not. Thus, Wildman's results do not take an uneven population distribution into account, nor does Wildman address the issue of whether a cable operator can price discriminate within a cable community.

[27] *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong. 2d Sess. 59 at 66 (FCC should establish objective nationwide criteria which are readily applicable), reprinted in 1984 U.S. Code Cong.and Admin. News at 4703.

[28] The proportion of coverage specification is relevant only to the Grade B contour aspect of the signal availability standard. As indicated above, significant viewing determinations are to be made on the basis of randomly selected community-widesamples. Thus, we will consider signals that are significantly viewed to be available to the entire cable community. For example, assume a cable system were to demonstrate that three signals were available on the basis of the Grade B contours of two signals and the significant viewing of a third. The two Grade B contours would have to overlap the entire geographic area of the community for them to count toward meeting the effective competition standard. The significantly viewed signal would be considered available on a community-wide basis by virtue of the community-wide random survey necessary to demonstrate significant viewing.

[29] For example, assume that each of six signals are available to 50 percent of a cable community: signals A, B, and C cover one-half of the cable community; and, signals D, E, and F cover the other one-half of the cable community. In this instance, even though no *one* signal covers 100 percent of the community, fully 100 percent of the cable community is within the predicted Grade B contours of three signals and effective competition for the local cable system would exist under the revised standard.

[30] In cases where the overlap is clear, that is, where the Grade B contours extend appreciably beyond the commnity boundaries, adequate determinations can be made using the annual *Cable and Station Coverage Atlas* published by *TV Digest* or some other reliable source of published information. Where one or more of the required Grade B contours is near a community boundary, more detailed maps and contour plots requiring individualized preparation may be necessary, entailing a somewhat greater research burden. However, we believe the burden and difficulty in such cases will be considerably less than that which would be involved in assessment of proportions of area covered under a less than full encompassment standard.

[31] The waiver procedure that we adopt herein and describe below will provide a process for more precise individual review, but we believe that our revisions will substantially lessen the occasions in which waivers will be needed.

[32] This field strength evaluation is not the same as that used for predicting a station's Grade B contour, which indicates the approximate extent of coverage over average terrain. The Grade B contour may extend far past the community in question, even though the community, as a result of terrain conditions, may experience poor reception.

[33] In lieu of the requirement for a mobile run of at least 100 feet, a "cluster" of five spot measurements may be made. The first measurement in the cluster is identified. Generally, the locations for other measurements shall be within 200 feet of the location of the first. *See* Section 73.686(b)(2)(viii) of the rules. 47 CFR §73.686(b)(2)(viii).

[34] 47 CFR §73.686(c)(1)(ii). This section provides that the number of locations at which measurements are made shall be at least 15 and shall be approximately equal to 0.1 times the square root of the population of the area if that product is greater than 15.

[35] *See Report and Order, supra*, at paragraph 108.

[36] Our action herein does not modify or affect the field strength measurement standards set forth in Section 73.686 of our rules as they apply in any other context.

[37] Federal Communications Commission Authorization Act of 1987, October 9, 1987, House Committee on Energy and Commerce, H.R. Rep. No. 2961, 100th Cong., 1st Sess. (1987) at 6, which directs the Commission to "develop a refined and improved propagation model for television and FM broadcast sta-

tions incorporating the effects of topography, terrain and other factors for making determinations whether a particular applicant's signal will interfere with the signal of an existing station."

[38] We believe that it would be inappropriate to evaluate a cable system's rates and profits as part of the waiver mechanism, as suggested by NLC. Such an approach would require that the Commission establish a "rate of return" regulatory standard for cable service. The Commission has already considered and rejected such an approach in the *Report and Order* of this proceeding, citing its inherent costliness and complexity. *Report and Order* at para. 125 NLC has offered no new evidence with respect to the benefits of this approach that persuades us to alter our conclusion.

[39] *ACLU supra* at 1573, n. 37. The court therein refers generally to the Brief of Intervener City of Dubuque, Iowa. Dubuque's Brief expresses concern that the required engineering studies can cost upwards of 25,000. Brief at 19.

[40] As discussed in the *Report and Order*, the demand for cable service is determined by a number of factors in addition to the availability of over-the-air broadcast signals. These factors include price, quality of service, area viewing tastes and income, and the availability of additional signals. Consequently, cable penetration in a community generally is not a reliable indicator of broadcast reception problems.

[41] This notice process is comparable to that used in Section 76.54(c) of the rules. *Cf. Cable Television Report and Order Reconsideration*, 36 FCC 2d 326 para 62 (1972).

[42] TCI requests that we amend the definition of "basic cable service" to exclude signals that have been determined not to be available towards satisfying the effective competition standard. This, according to TCI, would give cable operators added flexibility in fashioning their service. TCI states that otherwise the rules burden the regulated cable system in that many "local" signals might be carried on a rate-regulated basis, although fewer than three of the signals qualify for effective competition. NYC opposes TCI's proposal, arguing that it conflicts with the definition of basic cable service contained in the Cable Act. This issue is beyond the scope of this proceeding and will not be addressed herein.

[43] "Not later than 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recomendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace." Section 623(h) of the Cable Act, 47 U.S.C. §543(h).

[44] We note, for example, that the requirements for a special audience study as specified in Section 76.54(b) of the rules provide that such survey cover at least two weekly periods separated by at least thirty days and no more than one of which shall be a week between the months of April and September. Furthermore, Section 76.54(c) provides for notice of a such a survey to be served on specified interested parties at least thirty days prior to the initial survey period. We are amending this provision to include local franchising authorities among the interested parties entitled to notice.

[45] We note Cable Commenters request that the Commision provide a one-year grace period from the effective date of the new rules before a cable system can go from the unregulated state to the regulated state. We believe the six- month delay we are adopting here is a sufficient amount of time for a cable operator to adapt to the onset of regulation as a consequence of changes made herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-215

In the Matter of

Amendments of Part 69
of the Commission's Rules
Relating to Enhanced Service
Providers

ORDER

Adopted: April 19, 1988; Released: April 27, 1988

By the Commission:

I. INTRODUCTION

1. On June 10, 1987, we adopted a Notice of Proposed Rule Making in this docket to consider whether providers of interstate enhanced services should be assessed interstate access charges.[1] We sought comment from interested parties on this issue, and asked for detailed data on the state of the enhanced services industry. The record in this proceeding indicates that, as a result of a number of complex and interrelated factors, the enhanced services industry is entering a unique period of rapid and substantial change. First, the Open Network Architecture (ONA) Plans required in our *Computer III* proceeding[2] were filed on February 1, 1988, but have not yet been implemented. Second, the District Court overseeing the Modification of Final Judgment (MFJ) in the Bell System divestiture case has recently modified the restriction in the decree that had previously prevented the Bell Operating Companies (BOCs) from offering any information services. [3] These regulatory and judicial events make this an unusually volatile period for the enhanced service industry. We have decided not to eliminate the exemption from interstate access charges currently permitted enhanced service providers at this time. Under the circumstances, we also find that any discrimination that exists by reason of the exemption remains a reasonable one so long as the enhanced services industry remains in the current state of change and uncertainty.[4] While we could simply keep this docket open until these changes have run their course, this approach could add to the substantial uncertainty already confronting the enhanced services industry. Accordingly, we will terminate this Rule Making proceeding. We will continue to observe the effects of these factors, and at some appropriate future date, we can revisit the issue. We would, of course, commence any such proceeding by issuing another Notice of Proposed Rule Making.

II. BACKGROUND

2. In 1983 we adopted a comprehensive "access charge" plan for the recovery by local exchange carriers (LECs) of the costs associated with the origination and termination of interstate calls.[5] The four primary goals of the access charge proceeding include the "elimination of unreasonable discrimination and undue preferences among rates for interstate services."[6] Specifically, in pursuing this goal we have sought to distribute the costs of exchange access service fairly among all users of exchange access, regardless of their designation as carriers, non-carrier service providers, or private customers.[7] At the time we adopted the original access charge plan, however, we concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations and cause disruptions in providing service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.[8] We did not intend those exemptions to be permanent,[9] and we have since eliminated several of them. For example, in CC Docket No. 86-1 we eliminated the access charge exemptions for resellers.[10] In the *Notice* initiating this docket, we expressed concern that the charges currently paid by enhanced service providers may not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. We observed that to the extent enhanced service providers are exempt from switched access charges, other users of exchange access are forced to bear a disproportionate share of the local exchange costs that access charges are designed to cover. We reiterated our view that rate shock, which provided the original basis for the special treatment of enhanced service providers, justified a temporary but not a permanent exemption, and we tentatively concluded that an access charge exemption was no longer appropriate.[11] We asked interested parties to comment on this tentative conclusion and to provide detailed data on the state of this industry.[12] We also invited comment on implementation issues arising from our proposal.[13]

III. COMMENTS AND REPLIES

3. We received comments from 129 parties, reply comments from 35 parties, and many informal comments and letters.[14] In general, LECs, state public utility commissions, and some consumer groups support eliminating the exemption from interstate access charges for enhanced service providers. Enhanced service providers, telecommunications equipment manufacturers, and users of enhanced services generally oppose elimination of the exemption.

4. The BOCs, with the exception of NYNEX, generally support eliminating the exemption, either immediately or with a transition. The BOCs and other LECs that support the proposal generally conclude that its adoption would further the goals of the access charge proceeding,[15] and that enhanced service providers use the local network in the same way as other entities that currently pay interstate access charges.[16] Ameritech, Centel, and NTCA argue that the possibility of rate shock no longer justifies special treatment, since enhanced service providers have had notice that interstate access charges might be assessed.[17] However, Centel, as well as other LECs, advocate a gradual transition to full interstate access charges for enhanced services.[18] NYNEX, on the other hand, proposes deferring

resolution of the issue until after ONA implementation. NYNEX claims that enhanced service providers will no doubt have to reconfigure their networks in response to the BOCs' ONA offerings and thus it would be unwise to impose access charges on these users in advance of that time.[19]

5. The D.C. People's Counsel, the Michigan PSC, the Florida PSC, the New York Attorney General, and the National Consumers League support elimination of the exemption. These state and consumer entities argue that all users of the local exchange should pay a fair share of the costs of the local network, and that because of the exemption, other users of the local exchange now pay a disproportionate share of the costs.[20] The New York Attorney General and the National Consumers League say that the present exemption may result in users of voice services subsidizing users of data services.[21]

6. Enhanced service providers strongly oppose the proposal to eliminate their exemption from interstate access charges. CompuServe, Telenet, and Tymnet argue that the imposition of interstate access charges would increase rates for enhanced services, depress demand, and impede the growth of a mass market for enhanced services at a critical time in the development of enhanced services.[22] ADAPSO, Dialcom, Teleconnect, GE, IIA, and Trintex argue that implementing the proposal would have adverse effects on the enhanced services industry, which they assert is still at an infant stage of development, and indirectly harm other industries dependent on the enhanced services industry.[23] A large number of enhanced service providers argue that assessing interstate access charges on enhanced service providers would make only a minor contribution toward reducing LEC interstate revenue requirements, and consequently would not result in any noticeable decrease in rates for voice services.[24] Finally, some enhanced service providers assert that they did not have sufficient notice that this Commission intended eventually to require them to pay interstate access charges.[25]

7. Telecommunications equipment manufacturers filing comments also oppose elimination of the exemption. Apple, DEC, EIA, IBM, and Tandy argue that adoption of the proposal in the *Notice* would seriously injure enhanced service providers and their customers.[26] Groups representing both large and small users assert that we should consider the social and economic benefits of broadly available enhanced services before we act in this area.[27] Users generally object to the proposal to eliminate the exemption, and argue that rates for enhanced services would increase.[28]

8. A number of parties suggest, like NYNEX, that we postpone consideration of the enhanced services exemption from interstate access charges until after ONA has been implemented. For example, CompuServe argues that, even if we accept none of its other arguments for maintaining the exemption, we should nevertheless defer further consideration of our proposal pending full implementation of ONA by the LECs.[29] Similarly, the Alarm Industry while generally opposing the imposition of access charges on enhanced services, also argues that, at the very least, this action should not be taken now because of uncertainty regarding the effects of ONA implementation on this industry.[30] The Boston Computer Society recommends that we continue the exemption until the implementation of ONA and, at that time, begin a transition to full interstate access charges over a period of 24 months.[31] Tymnet agrees with NYNEX that that enhanced service providers may well have to reconfigure their networks in order to use ONA services, and suggests that a change in the access charge rules might result in temporary reconfigurations that would be a waste of resources.[32]

9. Enhanced service providers state generally that the industry is fragile because it is still relatively new, with rapid growth rates, many new entrants, and market segments that are just beginning to emerge from the experimental stage. Thus they conclude that the immediate imposition of interstate access charges could be quite disruptive.[33] NTIA, for example, argues strenuously against the immediate imposition of access charges on enhanced service providers on the ground that despite rapid growth, the market for information services is still in a very early stage of development, and that the public interest would be served by fostering further development of this market by continuing the current exemption.[34] Some enhanced service providers argue in their comments that the specific segments of the industry in which they participate are in the formative stages of development and growth.[35] A number of parties state that the emerging consumer-oriented services, while still small in scope,[36] are in a particularly dramatic phase of growth.[37]

10. 3M Media Services objects to immediate imposition of interstate access charges on enhanced service providers on the grounds that access charges may decrease in the future.[38] 3M argues that a sudden application of access charges at their current levels would disrupt the industry, and that if access charges do decrease, this disruption will have been unnecessary, at least in part.

11. California also opposes immediate assessment of interstate access charges on enhanced service providers, and argues that we should await further judicial action on BOC provision of information services in *United States v. Western Electric Co.*[39] before considering whether to adopt the proposed rule changes. California contends that the extent of BOC participation in the information services sector remains unclear, and suggests that we defer consideration of our proposal until we are able to assess the relevance of this important factor.[40]

12. Finally, Telenet recommends in its reply comments that this proceeding be terminated, asserting that the mere pendency of the proceeding has had an adverse impact on the enhanced services industry. Telenet argues that since this Commission proposed to eliminate the enhanced service exemption from interstate access charges, many users and providers of enhanced services have delayed plans for expansion of existing services, as well as plans for new offerings.[41]

IV. DISCUSSION

13. Although the telecommunications industry in general has been characterized by substantial change in recent years, the record in this proceeding indicates that the enhanced services industry is in a uniquely complex period of transition. This Commission is currently in the process of reviewing ONA plans that may have a substantial effect on the manner and the terms under which enhanced service providers will originate and terminate their interstate traffic. Moreover, the MFJ Court has recently ruled that the BOCs may provide certain types of information services, raising other important questions about how enhanced services will be provided to the public. The interrelationship of these factors, which is still

unfolding, and their potential effects on the provision of enhanced services to the public lead us to conclude that this is not an appropriate time to assess interstate access charges on providers of enhanced services.

14. The ONA requirements we adopted in the *Computer III* proceeding[42] will enable the enhanced service operations of the BOCs and their competitors to interconnect to specific basic service elements (BSEs) and interfaces on an unbundled and "equal access" basis.[43] As required in the *Phase I Order*,[44] the BOCs and AT&T filed ONA plans in CC Docket No. 88-2 on February 1, 1988. We anticipate extensive public comment on these plans, which are lengthy and complex, to be followed by careful review by Commission staff. Moreover, after Commission approval of their ONA plans, the BOCs may take up to one year to implement their initial sets of BSEs. Thereafter, deployment of BSEs in BOC service areas will occur according to schedules in the BOCs' ONA plans to be approved by this Commission. As NYNEX and Tymnet note in their comments, ONA may well require enhanced service providers to reconfigure their networks in order to take full advantage of the unbundled BSEs. At the very least, as the Alarm Industry suggests, there is some uncertainty in the enhanced services industry as to the pricing and technical effects of the implementation of ONA. We concur with the assessment of such parties that it would be prudent to defer consideration of our proposal to remove the enhanced service access charge exemption until we are more certain of the effects of ONA in this context.

15. Moreover, we agree with California that the actions of the MFJ Court regarding BOC provision of information services could substantially affect the enhanced services industry in ways that presently are unclear. The MFJ contains a restriction on BOC provision of "information services," a category that appears to be substantially equivalent to this Commission's regulatory category of "enhanced services."[45] In its decision following the first triennial review of the MFJ restrictions, the MFJ Court retained the decree restriction on BOC provision of services involving the generation of information content, but stated that it was prepared to exempt from the restriction BOC transmission of information generated by others.[46] In its *March 7 Decision*, the MFJ Court reaffirmed the prohibition on BOC "information content" services, but also said that the BOCs will be permitted to "engage in the transmission of information as part of a gateway to an information service," and to provide "voice storage and retrieval services."[47]

16. While the *March7 Decision* could have substantial effects on the enhanced service industry, the extent and nature of those effects are difficult to ascertain precisely at the present time. Because the BOCs already provide local exchange service to much of the country, BOC entry into the markets for the services permitted by the *March 7 Decision* will presumably require many other enhanced service providers to adjust their activities to meet the new competition that the BOCs provide. Moreover, to the extent that enhanced service providers use the gateway services that the *March 7 Decision* permits the BOCs to offer, such gateways may both promote the growth of the industry and affect significantly the manner in which enhanced service providers access their customers.

17. We believe that given the combined effects of the impending ONA implementation and the entry of the BOCs into certain aspects of information service, the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.[48]

18. Few of the parties who advocate eliminating the enhanced service exemption from interstate access charges urge immediate implementation. Bell Atlantic, Centel, Pacific Telesis, US West, the Florida PSC, and the National Consumers League all suggest that a transition would be appropriate.[49] Many of the arguments that support a transition also support deferral of consideration of our proposal to assess interstate access charges on enhanced service providers.[50] We have elected to terminate this proceeding at this time, rather than simply leave the docket open and defer taking action, because we believe the latter course would result in undue confusion and little increased public benefit. We are also not inclined to allow the record developed in this docket to grow stale.[51]

19. A number of parties challenge our tentative conclusion in the *Notice* concerning the discriminatory aspects of the access charge exemption for enhanced service providers on the ground that their use of the local network differs from that of entities that are currently subject to those charges. We need not, however, resolve that issue in this order. We conclude for the reasons discussed above that, to the extent the exemption for enhanced service providers may be discriminatory, it remains, for the present, not an unreasonable discrimination within the meaning of Section 202(a) of the Communications Act of 1934.[52]

20. Accordingly, as we have concluded that this is not an appropriate time to assess interstate access charges on the enhanced services industry,[53] we will terminate this Rule Making proceeding.

V. ORDERING CLAUSE

21. Pursuant to Sections 1, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 201-205, this DOCKET IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

PARTIES FILING COMMENTS

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. ADAPSO
3. Alarm Industry FCC Advisory Committee (Alarm Industry)
4. American Airlines
5. American Association of Community and Junior Colleges (AACJC)
6. American Bar Association (ABA)
7. American Council on Education

8. American Library Association
9. American Newspaper Publishers Association (ANPA)
10. American Petroleum Institute
11. American President Companies, Ltd.
12. Ameritech Operating Companies (Ameritech)
13. Apple Computer, Inc. (Apple)
14. Aeronautical Radio, Inc., and the Air Transport Association of America (ARINC)
15. Associated Credit Bureaus, Inc.
16. Associated Service Users
17. Association of Research Libraries
18. Automatic Data Processing, Inc.
19. Bayer, Barry D.
20. Bell Atlantic
21. BellSouth
22. Bernstein, Marc and Tamara
23. Boeing Computer Services Company
24. Boston Computer Society
25. Brown, Donald A.
26. Buc, Richard A.
27. Buda, Daniel Stephen
28. California Bankers Clearing House Association, Mastercard International Incorporated, New York Clearing House Association, and VISA USA, Inc. (California Bankers)
29. People of the State of California and Public Utilities Commission of the State of California (California)
30. Capital Cities/ABC, Inc. and National Broadcasting Company, Inc. (Capital Cities)
31. Centel Corporation
32. Chilton Corporation
33. Church of Jesus Christ of Latter-Day Saints
34. Cincinatti Bell Telephone (Cincinatti Bell)
35. Cohen, Robert M.
36. Committee of Corporate Telecommunications Users (CCTU)
37. Commodity Systems, Inc.
38. Communications Workers of America
39. CompuServe
40. Computer Language Research, Inc.
41. Computer Sciences Corporation
42. Davis, Becky A.
43. Office of the People's Counsel of the District of Columbia (D.C. People's Counsel)
44. Department of the Army
45. Dialcom, Inc. (Dialcom)
46. Digital Equipment Corporation (DEC)
47. Dow Chemical Company
48. Dow Jones & Company, Inc.
49. Dun & Bradstreet Corporation (Dun & Bradstreet)
50. Report by Economics and Technology, Inc. at the request of ARINC, DEC, GE, IIA, Quantum, Trintex, Xerox, CCTU (ETI)
51. Electronic Funds Transfer Association (EFTA)
52. Electronic Industries Association [Consumer Electronics Group] (EIA)
53. Electronic Mail Association
54. Enhanced Service Providers Association
55. Equifax Inc. (Equifax)
56. Farenthold, R. Blake
57. Fit to Print, Graphic and Information Services
58. Florida Public Service Commission (Florida PSC)
59. General Electric Communications and Services (GE)
60. Goldberg, Alfred
61. General Services Administration (GSA)
62. GTE Telephone Companies
63. Hallstrom, Dr. Curtis
64. Harris, Deborah
65. Hawkins, Alice
66. Hayes Microcomputer Products, Inc. (Hayes)
67. Huffman, Robert E.
68. Instructional Telecommunications Consortium of the AACJC
69. Information Industry Association (IIA)
70. Interactive Technologies, Inc.
71. International Business Machines Corporation (IBM)
72. IBM PC Special Interest Group on The Source
73. International Communications Association (ICA)
74. ITT World Communications, Inc.
75. Krauss, Jeffrey
76. Logical Software, Inc.
77. Maine Legislative Council
78. Massengale, Dr. Martin A.
79. McGraw-Hill, Inc.
80. Mead Data Central
81. Mellon Bank
82. Merit Computer Network
83. Michigan Public Service Commission Staff (Michigan PSC)
84. Moore, Michael L.
85. Muhlerin, William S.
86. National Association of Realtors
87. National Association of State Directors of Special Education, Inc.
88. National Association of State Universities and Land Grant Colleges
89. National Cotton Council of America
90. National Data Corporation
91. National Retail Merchants Association
92. National Telephone Cooperative Association (NTCA)
93. New York Public Library
94. Northeastern University
95. National Telecommunications and Information Administration (NTIA)
96. NYNEX Telephone Companies (NYNEX)
97. OCLC
98. Oklahoma Health Sciences Library Association
99. Pacific Bell and Nevada Bell (Pacific)
100. PARS Service Partnership
101. Phone Programs, Inc.
102. Public Interest Computer Association (PICA)
103. Public Service Enterprise Group
104. Quantum Computer Services Inc. (Quantum)
105. Rochester Telephone Corporation (Rochester)

106. Security Pacific Corporation
107. South Dakota State Library
108. Source Telecomputing Corporation (The Source)
109. Southern Connecticut State University
110. Southwestern Bell Telephone Company (Southwestern Bell)
111. Special Libraries Association
112. Stone, Gerald
113. Tandy Corporation (Tandy)
114. Tele-Communications Association
115. Teleconnect Company (Teleconnect)
116. Telenet Communications Corporation (Telenet)
117. Teltec Saving Communications Co. and Clark Telecommunications Inc. (Teltec)
118. Trans-Union Credit Information Co.
119. Trintex
120. Tymnet-McDonnell Douglas Network Systems Company (Tymnet)
121. UNISON Telecommunications Service
122. U.S. Small Business Administration
123. United States Telephone Association (USTA)
124. Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)
125. Videotex Industry Association
126. Warwick, John C.
127. Western Union Telegraph Company
128. Xerox Corporation (Xerox)
129. 3M Media Services Inc.

PARTIES FILING REPLY COMMENTS

1. Ad Hoc
2. ADAPSO
3. ANPA
4. ARINC
5. California Bankers
6. Church of Jesus Christ of Latter-Day Saints
7. Cincinatti Bell
8. CompuServe
9. CCTU
10. DEC
11. Dun & Bradstreet
12. EFTA
13. Equifax
14. Erickson, Larry
15. ETI
16. GE
17. Hayes
18. Howard University School of Law
19. IIA
20. Motorola, Inc.
21. National Consumers League (NCL)
22. NTIA
23. New York Attorney General
24. Pacific
25. Quantum
26. Radio Telecom and Technology, Inc.
27. Rollins, Inc.
28. Society of Broadcast Engineers (SBE)
29. Southwestern Bell
30. Telenet
31. Trintex
32. Tymnet
33. United Methodist Church [General Council on Finance and Administration]
34. USTA
35. Xerox

FOOTNOTES

[1] Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rule Making, 2 FCC Rcd 4305 (1987) (hereinafter *Notice)*.

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986) (hereinafter *Phase I Order)* ; *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *modified on further reconsideration*, FCC 88-9 (released February 18, 1988); *see also* Report and Order, 2 FCC Rcd 3072 (hereinafter *Phase II Order), modified on reconsideration*, FCC 88-10 (released February 18, 1988).

[3] United States of America v. Western Electric Company, Inc., No. 82-0192, slip op. (D.D.C. March 7, 1988) (hereinafter *March 7 Decision)*.

[4] *See infra* paras. 13-17.

[5] MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682 (1983) (hereinafter *First Reconsideration)*.

[6] *See , e. g., id.* at para. 3.

[7] *Id.* at para. 77.

[8] Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. *See* 47 C.F.R. § 69.2(m); Northwestern Bell Telephone Company Petition for a Declaratory Ruling, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 at para. 20 (1987), *appeal docketed*, No. 87-1745 (D.C.Cir. Dec. 4, 1987). Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. Enhanced service providers also pay special access surcharges for private lines under the conditions set out in our rules. *See* 47 C.F.R. § 69.5(a) and (c).

[9] *First Reconsideration, supra* note 5, at para. 83.

[10] WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order, CC Docket No. 86-1, FCC 86-115 (released March 21, 1986) (eliminating the exemptions for WATS resellers and MTS resellers); Second Report and Order, CC Docket No. 86-1, FCC 86-377 (released August 26, 1986) (eliminating the exemption for private line resellers that offer non-MTS/WATS services).

[11] *Notice, supra* note 1, at para. 8.

[12] *Id.* at para. 10.

[13] *Id.* at para. 11.

[14] *See* Appendix A, attached hereto, for a list of formal comments received. In the balance of this Order, we will use the abbreviations for commenters that appear in that Appendix. CCTU and the National Association of Realtors filed late comments and the Society of Broadcast Engineers filed late reply comments. Each of these parties submitted a Motion to Accept Late Filed Comments, and no party opposed those motions. Since

we find that no party would be prejudiced by our granting these motions, we grant them and accept these late filed comments and replies. We treat as informal comments those comments and replies that were filed late and were not accompanied by a proper motion.

[15] *See , e. g.*, BellSouth Comments at 4.

[16] *See , e. g.*, Ameritech Comments at 3; BellSouth Comments at 5; US West Comments at 3; Centel Comments at 1; Cincinatti Bell Comments at 1-2; NTCA Comments at 1; Rochester Comments at 3; Teltec Comments at 4.

[17] Ameritech Comments at 4-5; Centel Comments at 2; NTCA Comments at 4-5.

[18] *See* Centel Comments at 2; Bell Atlantic Comments at 3; Pacific Comments at 11.

[19] NYNEX Comments at 3.

[20] *See* Michigan PSC Comments at 2; DC People's Counsel Comments at 2; NCL Reply Comments at 2; New York Attorney General Reply Comments at 4.

[21] New York Attorney General Reply Comments at 4; NCL Reply Comments at 2.

[22] CompuServe Comments at 15-24; Telenet Comments at 8-12; Tymnet Comments at 10-21.

[23] ADAPSO Comments at 24-36; Dialcom Comments at 20-23; Teleconnect Comments at 9; GE Comments at 17-20; IIA Comments at 30-31; Trintex Comments at 4.

[24] *See , e. g.*, CompuServe Comments at 27; Telenet Comments at 16; Tymnet Comments at 10-21; ADAPSO Comments at 22; GE Comments at 22-23; IIA Comments at 23.

[25] *See , e. g.*, Chilton Comments at 7; Equifax Comments at 4-6.

[26] Apple Comments at 19; DEC Comments at 4-5; EIA Comments at 6-8; IBM Comments at 8-11; Tandy Comments at 4-5.

[27] *See , e. g.*, Ad Hoc Comments at 58; Church of Jesus Christ of Latter-Day Saints Comments at 14-15; Associated Service Users Comments at 4-5.

[28] *See , e. g.*, ARINC Comments at 8; Capital Cities Comments at 1; ICA Comments at 4-5; Association of Research Libraries Comments at 1; Boston Computer Society Comments at 4-6.

[29] *See also* Teleconnect Comments at 25-27; Computer Sciences Corporation Comments at 1; PICA Comments at 10; Telenet Comments at 45; Dialcom Comments at 10; Electronic Mail Association Comments at 15.

[30] Alarm Industry Comments at 5-6.

[31] BCS Comments at 8.

[32] Tymnet Reply Comments at 41.

[33] *See , e. g.*, ABA Comments at 9; EFTA Comments at 5-6; McGraw-Hill Comments at 7.

[34] NTIA Comments at 11-13. Logical Software, McGraw-Hill, CCTU, and Associated Service Users agree that the information services industry is not yet mature, or even approaching maturity. Logical Software Comments at 2; McGraw-Hill Comments at 2; CCTU Comments at 36; Associated Service Users Comments at 5. Telenet estimates that enhanced service providers accounted for 3.2 to 4.2 billion dial minutes of use in 1987, and therefore would contribute at most only two percent additional minutes to the CCL pool, resulting in a potential reduction in long distances rates of no more than one half of one percent. Telenet Comments at 17-19.

[35] For example, the Electronic Funds Transfer Association says that electronic funds transfer, and particularly point-of-sale debit card services, are nascent. EFTA Comments *passim*. The Videotex Industry Association argues that, even if this Commission's proposal to assess interstate access charges on enhanced service providers is equitable, we should not take any such action until the videotex industry has become more developed and mature. VIA Comments at 14. VIA estimates that the consumer videotex market generated 500 million minutes of use in 1987. VIA Comments at 2.

[36] The Economics and Technology, Inc. report submitted by ARINC et al. estimates that the total number of subscribers for low end services (4-12 per hour) is between 750,000 and 1,000,000 -- only about 1% of the total number of households in the U.S., and only about 4-5% of households with personal computers. Selwyn and Kravtin, An Economic Analysis of the Impact of Interstate Switched Access Charge Treatment on Information Service Providers (report prepared at the request of ARINC, DEC, GE, IIA, Quantum, Trintex, Xerox, and CCTU) at 14-15.

[37] *See , e. g.*, Telenet Comments at 33, n.25; CompuServe Comments at 16; Tymnet Comments at 6. Telenet asserts that consumer-oriented services have experienced a 76.2% annual growth rate during the 1982-1987 period.

[38] 3M Comments at 1. In the *Notice* we stated that with additional increases in subscriber line charges scheduled for December 1988 and April 1989, the CCL charge for both originating and terminating traffic should decrease further. *Notice*, *supra* note 1, at para. 9.

[39] In the decision following the first triennial review of the MFJ restrictions, the MFJ Court said that it would issue a further decision describing the services the BOCs would be able to provide as exceptions to the information services restriction of the MFJ. *See* United States of America v. Western Electric Company, Inc., 673 F.Supp. 525 (D.D.C. 1987) (hereinafter *September 10 Decision)*. The MFJ Court issued its information services decision on March 7, 1988. *March 7 Decision*, *supra* note 3.

[40] California Comments at 2.

[41] Telenet Reply Comments at 21.

[42] *Computer III*, *supra* note 2.

[43] *Phase I Order*, *supra* note 2, 104 FCC 2d at 1019, para. 113.

[44] *Id.*

[45] *See* United States v. American Telephone and Telegraph, 552 F.Supp. 131, 179, 189-190 (D.D.C. 1982), *aff' d sub nom.* United States v. Maryland, 460 U.S. 1001 (1983).

[46] *September 10 Decision*, *supra* note 39, at 597.

[47] *March 7 Decision*, *supra* note 3, slip op. at 65-66.

[48] For example, to the extent that parties' concerns about rate shock are related to the present levels of access charges, we note that such charges will be decreasing as a result of a number of factors, including the further implementation of subscriber line charges. *See* MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Report and Order, 2 FCC Rcd 2953 (1987). Some parties contend that it would be preferable not to assess charges on enhanced service providers that are higher now than they will be in the near future. Any later review of the question of access charges for enhanced service providers would likely be based on charges at lower and more stable levels, which should provide a more certain basis for assessing their impact on the industry.

[49] Bell Atlantic Comments at 3; Centel Comments at 2; Pacific Comments at 11; US West Comments at 2; NCL Comments at 5; Florida PSC Comments at 4.

[50] *See , e. g.*, NCL Comments at 5 (three year phase-in would permit non- profit groups and educational institutions time to factor rate changes into their budgets); Bell Atlantic Comments at 3 (phase-in would reduce rate shock); Pacific Comments at 13-14 (transition would accomodate the development of the access charge structure and the promotion of a consumer mass market for enhanced service providers).

[51] Some enhanced service providers contend in their comments that they had insufficient notice that interstate access charges would at some point be assessed on their interstate services. For the reasons discussed in the *Notice* we do not agree. *See Notice*, *supra* note 1, at para. 8. Furthermore, it is through the adoption of a Notice of Proposed Rule Making that a regulatory agency, like this Commission, provides notice to interested parties about proposed changes in its rules. Notice in this case was sufficient in all respects. Nevertheless, to the extent that any party to this proceeding failed to realize that this Commission did not, in its access charge proceeding, intend to provide a permanent exemption to enhanced service providers, these entities now have actual notice of that fact.

[52] 47 U.S.C. § 202(a). *See* also National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095, 1136-37 (D.C.Cir. 1984).

[53] Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users. *See supra* note 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166

In the Matter of

Investigation of Special Access Tariffs of Local Exchange Carriers — Phase I

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1988; Released: April 29, 1988

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On November 9, 1988 the Common Carrier Bureau (Bureau) released a Memorandum Opinion and Order requiring local exchange carriers (LECs) to refund by January 8, 1988, excessive television service charges associated with polyethylene shielded video (PSV) cable investment paid by their customers.[1] The *Refund Order* is the subject of petitions for clarification and reconsideration or partial reconsideration filed by the Ameritech Operating Companies (Ameritech), Hughes Television Network (Hughes), the Association of Independent Television Stations, Inc. (INTV), the National Association of Broadcasters (NAB) and the New York Telephone Company (NYT).[2] In addition, NYT petitioned for a stay of the *Refund Order* pending resolution of its petition for reconsideration. [3] Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (the Networks) filed an opposition and New England Telephone and Telegraph Company and NYT (NYNEX) filed comments. NYT filed a reply. We have consolidated the petitions, with their responsive pleadings, for consideration here by the Bureau.[4] We grant the petitions of Ameritech, Hughes, INTV, and NAB, and deny that of NYT.

2. The *Refund Order* also required that all prospective recipients of refunds submit to this Bureau's Enforcement Division within 30 days of the release of the *Refund Order* their claims for refund. INTV and NAB requested that the time for complying with this requirement be extended 60 days so that they would have sufficient time to prepare their claims. INTV subsequently requested an additional 30 days.[5] Hughes requested in its petition that it be allowed 30 days after resolution of that petition to file its claim.

3. In Orders released February 19, 1985, March 8, 1985, and January 24, 1986 in CC Docket No. 83-1145, the Commission addressed rate and cost issues arising out of special access tariffs filed on December 2, 1984 by LECs, and initiated a limited special access investigation to focus upon unresolved issues.[6] Following the Commission's determination that the Networks had a valid concern regarding the LECs' inclusion of their full investment in unassigned PSV pairs in the video rate base, a partial disallowance of 50 percent of the PSV cable investment was imposed during the five-month investigation. *February 19 Order* at paras. 42-43. In its *March 8 Order* the Commission required the LECs to keep accounts of their video service revenues to permit refunds if they were found necessary. In a *Designation Order* released May 24, 1985, this Bureau requested information from the carriers regarding their PSV facilities.[7] The Commission's *January 24 Order* found that millions of dollars' worth of PSV cable is not used and has never been used to provide service to video ratepayers. It disallowed 50 percent of the unassigned PSV cable allocated by the LECs to the video service category, or26.7 million, and directed the LECs to file new tariffs reflecting the removal of this investment from their rate base. *Id.* at paras. 117-118.

4. In April 1987, the Networks petitioned the Commission for enforcement of an accounting order in the above-captioned docket and for refunds of excessive television service charges paid during the investigation of subsequently disallowed investment in PSV cable.[8] The petitioners requested that the LECs be required to refund, with interest, the difference between the rates that were charged during this time, and the rates that would have been charged had the26.7 million disallowance been in place. On November 9, 1987, this Bureau released the *Refund Order* requiring them to do so.

II. THE PLEADINGS

A. *Petitions for Reconsideration or Clarification*

1. Ameritech Petition

5. Ameritech states that Michigan Bell should be excused from the refund requirement because its video rates were not excessive, having been purged of the subsequently disallowed PSV cable investment by its July 1985 tariff filing.[9] On this basis, Ameritech, states, it was granted a waiver of the Commission's disallowance orders for Michigan Bell.[10] It further states that the *Michigan Waiver Order* found that Michigan had made a *prima facie* case that its rates already reflected the PSV disallowance required by the Order. *Id.* at para. 10. Ameritech argues that to impose a refund requirement now, for rates found to reflect the disallowance adequately, would be inappropriate. Ameritech notes that neither the Networks nor any other party has disputed this conclusion. Ameritech asserts that this Bureau's *Refund Order* finding of untimeliness with regard to Michigan Bell's argument that it should not pay refunds fails to take cognizance of the *Michigan Waiver Order*. Ameritech therefore bases its petition for reconsideration on three factors: (1) the factual error of this Bureau's assumption that Michigan Bell's video rates during the refund period were based on PSV investment that was later disallowed; (2) the fact that the imposition of a refund requirement would constitute a confiscatory penalty, in excess of the Commission's statutory authority; and (3) this Bureau's mischaracterization of Michigan Bell's arguments as an untimely and irrelevant petition for reconsideration of the PSV investigation.

2. Hughes, INTV and NAB Petitions

6. Hughes, INTV, and NAB assert that the *Refund Order* is too narrowly drawn, in two respects. First, they argue that it orders refunds only to the Networks, and not

to independents. Second, they contend that the *Refund Order* requires that refunds be made through AT&T. This requirement, according to these petitioners, ignores the fact that some video service arrangements involve only the LEC provider and the customer user, without the intervention of AT&T, so that those refunds should be paid directly. In addition, both INTV and NAB request that they be allowed 90 days after the resolution of their petitions for reconsideration to prepare their claims for refund;[11] Hughes requests a 30-day period for this purpose.[12]

3. NYT Petition

7. NYT argues that this Bureau failed to consider thoroughly its arguments, put forward in the *Refund Order* proceeding, that it should be excused from the refund requirement. NYT states that the Commission found, in its *January 24 Order*, that a26.7 million disallowance was necessary, but did not order any refund of past video rates. Further, NYT argues, the Commission stated that its calculation of the26.7 million amount was imprecise, and would be adjusted if any LEC quantified the correct amount of PSV investment in its rate base or demonstrated that its PSV cable pairs had been put to alternate use. NYT Petition at 4 (citing *Janaury 24 Order* at para. 41, n. 68). NYT submits that it did conduct such a study, in the first ten months of 1986, and found that it had undercharged its video users by1.8 million. NYT states that it submitted this study in October 1986 with its annual 1987 access tariff filing in support of its proposed 1987 video service rates. *Id.* at 4-5. While NYT does not seek to recover this loss, it argues that the Commission's disallowance was substantially overstated, and that the imposition of a requirement to refund video service charges from the period covered by the study would be inequitable. NYT asserts that this Bureau erred in its findings that: (1) NYT did not raise the argument that a video refund would result in a windfall to the Networks; (2) NYT cannot now challenge a refund because it did not challenge the Commission's disallowance order (*January 24 Order)* ; and (3) NYT's special study of PSV investment was untimely with regard to the refund proceeding.

8. NYT asserts, first, that the *Refund Order* statement, at para. 21, that the LECs did not argue that a refund would constitute a windfall to the video user parties is simply untrue, as NYT made that very argument. NYT states that it demonstrated, by reference to its PSV study, that the Commission's calculations of PSV disallowance, both in the interim period and in its final determination of26.7 million, were substantially overstated. NYT contends that no serious question has been raised as to the accuracy and reliability of its study and the study's results.

9. NYT next argues that it does not seek to challenge the Commission's *January 24 Order* disallowance. NYT asserts that the argument made by the Networks and adopted by the Bureau -- that NYT seeks reconsideration of the Commission's disallowance Order through reliance on the NYT PSV investment study, and that both the study and the attempt to gain reconsideration are untimely -- are simply wrong. NYT states that it has fully complied with the *January 24 Order* by including in its subsequent tariff filings the disallowances that order prescribes. NYT could not have argued against a refund at any earlier stage of the proceeding, it contends, since no refund had been ordered at any earlier stage.

10. Finally, NYT says that its PSV investment study and its equitable arguments are presented in a timely fashion and should compel the decision that the Networks are due no refund from NYT. NYT states that its PSV study was authorized and encouraged by the Commission in the *January 24 Order*, and was submitted six months before the Networks filed their petition for a refund. NYT complains that, while this Bureau in its *Refund Order* rejected NYT's study and its arguments as untimely for the purpose of excusing NYT from a refund obligation, we failed to support that conclusion.[13]

B. *Oppositions and Comments*

11. The Networks oppose, and NYNEX comments upon, the petitions for reconsideration. The Networks state that NYT's petition merely reiterates arguments already made. Network Opposition at 6-7. They state also that NYT's "special study" was belated for use in this proceeding, as the study was not even begun until six months after the Commission requested data.[14] Further, the Networks argue, when the Bureau directed the BOCs to allocate among themselves the53.5 million of unused PSV cable investment, NYT voluntarily accepted responsibility for6 million. Not only should NYT not be allowed to disavow what it has previously admitted, assert the Networks, but the Bureau should not allow6 million to be removed from the total pool to be allocated among the BOCs. *Id.* at 8-9. The Networks conclude that individual carriers must be required to pay refunds based upon the disallowance allocation factors which they themselves collectively developed.

12. The Networks argue further that NYT's study, even if it had been timely submitted, does not provide a basis for reconsideration. Challenging the NYT study as a collection of conclusory findings without supporting data, the Networks state that this study fails to provide the information originally requested by the Bureau in its *May 24 Order*. *Id.* at 11. They also argue that the Commission's allowing NYT's 1986 annual access tariffs, to which the study was appended, to become effective does not constitute acceptance or approval of the study. The Networks contend that NYT's attaching the study to its tariff filing rather than submitting it in this proceeding diminished the opportunity of parties in this proceeding for notice and comment.

13. The Networks note further that NYT participated in the NECA Special Access Pool during Phases I and II of the Refund Period, and that this participation belies NYT's claims that its rates during the Refund Period overstated the PSV disallowance. *Id.* at 12-14. The Networks argue that NYT's participation in the NECA pool during Phases I and II resulted in its recovering higher revenues than it would have if it had charged rates based on its own cost of service. They state that NECA's rate-averaging process failed to take into account the lower television service costs experienced in the states most heavily used by the Networks (including New York). The Networks attach an analysis of NYT television service rates that indicates that NYT's rates from April 1985 to December 1986 (Phase I, Phase II, and part of Phase III) were higher than the "corrected" rates that became effective in January 1987. *Id.* at 15 and Appendix A. Finally, the Networks state that if the Commission is to base its determination primarily on equitable considerations, as NYT insists, then the Commission must consider that while the Networks' claim is based only on a specific

period of time and a specific amount of disallowed investment, television service rates were also overstated due to excessive PSV investment from the 1960's until the April 1985 disallowance. *Id.* at 16.

14. The Networks argue further that Ameritech's petition to exempt Michigan Bell from refund obligations should be denied as to Phases I and II, and is moot as regards Phase III. *Id.* at 16-17. The Networks contend that Michigan Bell's Phase I television service rates reflected its share of the21 million disallowance, and that its Phase II rates reflected no disallowance at all. *Id.*

15. In its comments, NYNEX characterizes the Bureau's *Refund Order* as applying retroactively the Commission's *January 24 Order* disallowance. NYNEX Comments at 1. NYNEX does not oppose Ameritech's assertion that Michigan Bell should be exempted from the refund obligation, nor the inclusion of the independent television users as recipient parties. NYNEX maintains, however, that the Bureau's determination on reconsideration that NYT owes no refund to the Networks should apply also to the independents' claims against NYT. *Id.* at 2-3.

C. *NYT Reply*

16. NYT also submits reply comments to the oppositions to its petition. NYT argues that nothing in the Commission's Rules, the Communications Act or Commission precedent requires the dismissal of its petition for reconsideration, and that the Commission should consider all facts relevant to the question of whether NYT owes a refund. NYT Reply at 2-3. NYT asserts again that its PSV study was timely filed and provides sufficient grounds for reconsideration of the *Refund Order*, and that NYT's participation in the NECA pool does not alter the fact that its video customers received a windfall during the refund period.[15] *Id.* at 4-6. NYT discusses the "dilution," as a result of pooling, of the windfall effect from its overstated PSV disallowance. NYT states that its participation in the NECA pool meant that its overstated disallowance was spread over all video service users obtaining service under the NECA tariffs. (Thus the windfall received by a NYT-only video customer was diluted, and a non-NYT video customer could also receive some benefit.) NYT calculates that nationwide video service users like the Networks experienced an offset of the dilution and the benefit, so that it is likely that they received the full benefit of the windfall despite the pooling process. *Id.* at 6-7. NYT also takes issue with the Networks' calculation of its revenue differential and their analysis of video service rate trends. *Id.* at 7-9.

III. DISCUSSION

17. The Commission found in its *January 24 Order* that the LECs' inclusion in their rate bases of PSV cable that was not used and useful was unjustified. The procedures set forth in Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a) -- suspension and investigation followed by an accounting order -- were followed, and the final findings of the Commission were released in the *January 24 Order*. This Bureau's *Refund Order* then instructed the LECs to act upon the Commission's findings by refunding to television users any amounts that were based upon investments later found not justified, beginning from the Order suspending rates for investigation. Now we are faced with arguments regarding three specific aspects of that implementation Order.

18. Ameritech's arguments with regard to the exemption of Michigan Bell from the requirements of the *Refund Order*, and its reference to the *Michigan Waiver Order*, are well taken, and Ameritech's petition for reconsideration will accordingly be granted.

19. The arguments put forward by Hughes, INTV, and NAB in their petitions are similarly well-founded. The terms of the *Refund Order* make clear that all television users should be recompensed for any overpayments based on later-disallowed PSV cable investments. Petitioners argue that the ordering clauses narrow this requirement so that it defines as recipients only the Networks, and applies only to payments made through AT&T. We state unequivocally here, in clarifying the ordering clauses of the *Refund Order*, that all television user parties that were overcharged based on later-disallowed PSV cable investment must be reimbursed, and that overpayments made directly or through an intermediary other than AT&T are included and should be reimbursed via the same routes originally used in making payments.[16]

20. With regard to NYT's argument that it should be excused from any refund obligation, the arguments made here are the same as those made earlier, and we continue to find them unpersuasive. The proceeding in which the PSV cable investment disallowance was calculated was finalized by the *January 24 Order* ; subsequent orders have simply implemented those findings and established procedures. A series of orders prior to the Commission's January 1986 finding that26.7 million must be disallowed sought to calculate the exact amount of disallowance, and requested the LECs' help to do so. No LEC came forward with the requested information.

21. NYT initiated its "PSV study" some six months after the Commission required this additional information from the local exchange carriers. Further, NYT submitted the results of its study in a different proceeding -- the annual 1987 access tariff filings -- with no notice to the Commission or to the parties here that it would seek to rely upon that study in this proceeding. Meanwhile, NYT sought neither reconsideration nor clarification of the Commission's determination of the disallowance amount, but participated in the calculation of LEC shares in the disallowance.

22. Now NYT seeks to disavow its own previously-calculated obligation, as described in filings cited by the Networks.[17] Having declined the Commission's instructions to provide additional information,[18] NYT now seeks to apply retroactively a study begun after the Commission's final decision, and to adjust a refund calculation which it did not previously challenge.[19] As a by-product, NYT would deprive the recipient parties of more than a quarter of the overpayments the Commission has determined are due them.[20]

23. NYT states that it does not seek to modify the Commission's calculations from the *January 24 Order*, as that would clearly constitute an untimely petition for reconsideration. Since NYT accepts the calculations of the *January 24 Order*, and in view of NYT's own March 1986 filing acknowledging its6 million share of the total disallowance, the instant petition for reconsideration and clarification appear to be gratuitous. We agree with NYT that its study was timely undertaken and timely filed for the purpose for which it was intended and which it has adequately served -- to support NYT's video rates in its 1987 annual access tariff filing. The study was not, however, submitted in this PSV investigation, or submitted at

a time that would have made it applicable to this proceeding, or evaluated by the Commission or the parties in this proceeding. NYT's reliance on it for a modification of the conclusions of the PSV investigation is therefore misplaced.[21]

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the Petition for Reconsideration and Clarification of New York Telephone Company in this matter IS DENIED.

25. IT IS FURTHER ORDERED that the Petitions for Reconsideration or Partial Reconsideration of Ameritech Operating Companies, Hughes Television Network, the Association of Independent Television Stations, Inc., and the National Association of Broadcasters ARE GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, DA 87-1591, 2 FCC Rcd 6847 (1987)(*Refund Order*).

[2] Ameritech, Hughes and INTV filed petitions for reconsideration, NAB filed a petition for partial reconsideration, and NYT filed a petition for reconsideration and clarification.

[3] This request for stay was rendered moot by our determination that the refund calculations warranted further study.

[4] Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Telephone Company (US West) also submitted an application for review of the Order. Pursuant to Section 1.104(c) of the Commission's Rules, 47 C.F.R. § 1.104(c), the Commission will consider the application for review.

[5] These requests for extensions of time were granted by Bureau Orders released on January 12, 1988, DA 88-11, and February 8, 1988, DA 88-157.

[6] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-70, released Feb. 19, 1985 (*February 19 Order*) ; Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 85-100, 2 FCC 2d 1007 (1985) (*March 8 Order*) ; Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986 (*January 24 Order*).

[7] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (*Designation Order*).

[8] The petitioners divided the refund period -- April 22, 1985 through March 31, 1986 -- into three periods. The first is April 22 to August 1, 1985, when the disallowance of half of the estimated PSV cable investment, or21 million, was reflected in video rates. The second period is August 2 to September 30, 1985, when the suspension had expired, and no disallowance was in effect. (The carriers returned to their pre-suspension video rates). In the third period, October 1, 1985 to March 31, 1986, the LECs used video rates from the annual 1985 access tariff filings which were in effect; these reflected no disallowance.

[9] Michigan filed video rates that disallowed 361,680 for unused PSV cable investment. The methodology suggested by the Commission in a Memorandum Opinion and Order released February 21, 1986 resulted in a disallowance of only257,663 for Michigan.

[10] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 86-166, Phase I, Memorandum Opinion and Order, released Mar. 14, 1986 (*Michigan Waiver Order*).

[11] Both INTV and NAB petitioned for and were granted a 60-day extension of the *Refund Order*'s January 9, 1988 deadline for filing claims. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, DA 88-11, released Jan. 12, 1988. INTV subsequently requested and was granted an additional 30 days, setting its filing date at March 9, 1988. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, DA 88-157, released Feb. 8, 1988.

[12] At the time of the INTV and NAB extension requests, Hughes confirmed by letter its request to have its claim filing date established at 30 days after the order resolving its reconsideration request. Letter of George H. Shapiro, Esq., attorney for Hughes Television Network, to Jacqueline Spindler, Tariff Division, Jan. 22, 1988.

[13] NYT also refers to the Commission's Order In the Matter of Interconnection Arrangements Between and Among the Domestic and International Record Carriers, Memorandum Opinion and Order on Reconsideration, CC Docket Nos. 82-122 and 78-97, Phase II, FCC 87-161, 2 FCC Rcd 2999, 3006 (1987) for the proposition that equitable arguments, even though belatedly submitted, should be considered.

[14] We note also that the study, when it was completed, was submitted in NYT's annual access tariff filing, and not in this proceeding.

[15] NYT states that its video rates were about 4.5 percent lower during Phase I as a result of its overstated disallowance, but that during Phase II, when NECA's video rates reflected no PSV disallowance, no windfall dilution occurred. *Id.* at p. 6.

[16] INTV and NAB filed their claims on March 9, 1988. Pursuant to its original request, Hughes Television is granted 30 days from the release date of this Order to file its claim with the Enforcement Division of this Bureau.

[17] In NECA Transmittal No. 52, filed April 11, 1985, Attachment A, television investment figures are classified into categories including PSV cable investment. In New York Telephone Transmittal No. 755, filed March 12, 1986, NYT states: " . . . based on a total disallowance of 26,750,000 New York Telephone's allocated share is 6,016,386 (per Figure 1)."

[18] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985, at para. 8.

[19] NYT relies on the Commission's statement that it would consider modifying the disallowance figures "should any LECs hereafter justify the inclusion in their rate bases of disallowed PSV investment, either by quantifying this investment more specifically or demonstrating that the PSV cable pairs in question have been put to alternative use." *January 24 Order* at n.68. Given that NYT did not inform the Commission that it was undertaking a study or that it objected to the Commission's calculations, or petition for reconsideration in light of its proposed study, NYT's rationale is not persuasive.

[20] *I. e.*, NYT's acknowledged6 million share of the26.7 million total disallowance.

[21] We also reject NYT's argument that it could not at any earlier time have objected to the obligation to refund overpayments, as no refund was ordered prior to the *Refund Order*. As noted above, this proceeding was initiated with a suspension and investigation, and included an accounting Order and a disallowance Order. If NYT did not object to the suspension, the investigation, the accounting Order, or the disallowance of investment, it cannot now be heard to object to an Order that it pay the amounts it has previously acknowledged as its obligation. Such a course would be inequitable to the other parties in this proceeding.

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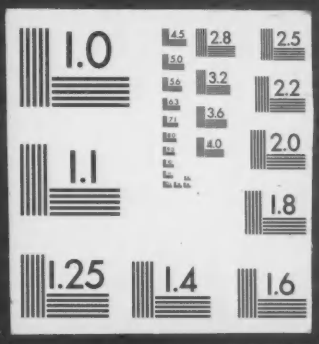
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